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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 888.

OSSIAN D. ASHLEY, THOMAS H. HUBBARD, JAMES F. JOY, AND EDGAR T. WELLES, PLAINTIFFS IN ERROR,

vs.

DANIEL J. RYAN, SECRETARY OF STATE OF THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED FEBRUARY 10, 1893.

(15,258.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 31, 1894.

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1 *Writ of Error to State Court.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the said supreme court of the State of Ohio, before you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Welles, plaintiffs in error, and Daniel J. Ryan, secretary of state of the State of Ohio, defendant in error, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of such validity, a manifest error hath happened, to the great damage of the said Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Welles, as by their petition appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 25th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

IRVIN BELFORD,
Clerk of the Circuit Court of the United States for the Northern District of Ohio.

2 STATE OF OHIO, *City of Columbus,* } *ss:*

To the honorable Supreme Court of the United States:

Pursuant to the command of the within writ of error: directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same before

our supreme court in a certain authenticated transcript to this writ attached, do send, as within we are commanded.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I, Urban H. Hester, clerk of the supreme court of Ohio, have set my hand and seal of said court this 7th day of September, A. D. 1892.

URBAN H. HESTER, *Clerk.*

3 [Endorsed:] Supreme Court of the United States. Ossian D. Ashley *et al. vs.* Daniel J. Ryan, secretary of state of the State of Ohio. Writ of error. Approved and record ordered made and transmitted as required. W. T. Spear, chief justice of supreme court, State of Ohio.

4 UNITED STATES OF AMERICA, *ss:*

To Daniel J. Ryan, secretary of state of the State of Ohio:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and ninety-two, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Ohio, wherein Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Welles are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated at Columbus this 28 day of July, 1892.

W. T. SPEAR,
Chief Justice of Supreme Court, State of Ohio.

Service of foregoing citation is hereby acknowledged.

J. K. RICHARDS,
Attorney General of Ohio.

August 24, 1892.

5 [Endorsed:] Supreme Court of the United States. Ossian D. Ashley *et al. vs.* Daniel J. Ryan, secretary of state of the State of Ohio. Citation.

6 *Assignment of Errors.*

Now come Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Wells, plaintiffs in error, and say that in the record and proceeding- aforesaid there is manifest error in this, to wit:

I. The supreme court of the State of Ohio erred in sustaining the demurrer of Daniel J. Ryan, secretary of state of the State of Ohio, defendant in error, to the amended petit-on of Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Wells, plaintiffs in error.

II. Judgment was given for Daniel J. Ryan, secretary of state of the State of Ohio, defendant in error, when judgment ought to have

been given for Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Wells, plaintiffs in error.

III. In this cause in the supreme court of the State of Ohio there was drawn in question the validity of a statute of such State, on the ground of its being repugnant to the Constitution of the United States as in regulation of commerce among the several States, and the decision was in favor of the validity of such State law.

IV. In this cause in the supreme court of the State of Ohio there was drawn in question the validity of a statute of such State, on the ground that it was repugnant to the Constitution of the United States in that it deprived the plaintiffs in error of the equal protection of the laws and subjected property to unequal and illegal taxation, and the decision was in favor of the validity of such State law.

Wherefore the said Ossian D. Ashley, Thomas H. Hubbard,
7 James F. Joy, and Edgar T. Wells, plaintiffs in error, pray that such judgment may be reversed and judgment be rendered in favor of these plaintiffs in error, as prayed for in said amended petition; that these plaintiffs in error be restored to all things they have lost by reason of said judgment.

HENRY CRAWFORD,
SWAYNE, SWAYNE & HAYES,
Attorneys for Pltfs. in Error.

8 *Transcript of Record and Proceedings.*

In the Supreme Court of Ohio.

OSSIAN D. ASHLEY, THOMAS H. HUBBARD, JAMES F. JOY, and EDGAR F. WELLS *vs.* DANIEL J. RYAN, Secretary of State.	Error to the Circuit Court of Franklin County.

March 28, 1892.—Petition in error and wa-ver of summons filed. Said petition in error is as follows:

In the Supreme Court of the State of Ohio.

OSSIAN D. ASHLEY, THOMAS H. HUBBARD, JAMES F. JOY, and EDGAR T. WELLS, Plaintiffs in Error, *against* DANIEL J. RYAN, Secretary of State of the State of Ohio, Defendant in Error.	Petition in Error.

Plaintiffs in error say that at the January term, 1892, of the circuit court of Franklin county, Ohio, defendant in error recovered a judgment by the consideration of said court against plaintiffs in error in an action then pending therein, wherein plaintiffs in error were plaintiffs and defendant in error was defendant, the original pleadings and papers and a transcript of the docket and journal entries whereof are filed herewith.

There is error in the record and proceedings of said court in this, to wit:

9 1st. Said court erred in sustaining the demurrer of defendant in error to the amended petition of plaintiffs in error.

2nd. Said judgment was given for said Daniel J. Ryan, Secretary of state of the State of Ohio, when judgment ought to have been given for Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Welles, the plaintiffs in error in this court.

Plaintiffs in error therefore pray that said judgment may be reversed; that said demurrer be overruled, and that judgment be rendered in favor of these plaintiffs in error as prayed for in said amended petition, and that these plaintiffs in error be restored to all things they have lost by reason of said judgment

SWAYNE, SWAYNE & HAYES,
HENRY CRAWFORD,
Attorneys for Plaintiffs in Error.

STATE OF OHIO, } ss:
Lucas County, }

Birchard A. Hayes, being first duly sworn, says that he is one of the attorneys for the plaintiffs in error in this action; that all of said plaintiffs in error are non-residents of and now absent from the State of Ohio, for which reason affiant makes this affidavit; that the statements in the foregoing petition in error and also the statements in the amended petition filed in the circuit court and hereto attached are true.

BIRCHARD A. HAYES.

Sworn to before me and subscribed in my presence this 25th
10 day of March, 1892.

[SEAL.] GEORGE H. BECKWITH,
Notary Public, Lucas County, Ohio.

Said waiver of summons is as follows:

In the Supreme Court of the State of Ohio.

OSSIAN D. ASHLEY, THOMAS H. HUBBARD, James F. Joy, and Edward T. Welles, Plaintiffs in Error, *against* DANIEL J. RYAN, Secretary of State of the State of Ohio, Defendant in Error. } Entry of Appearance.

I hereby waive the issue and service of summons in error and enter my appearance herein.

DANIEL J. RYAN,
Secretary of State, Defendant in Error.

1892, M'ch 28. Circuit court transcript filed.
" " " Original papers filed.
" " " Papers taken by attorney general.
" " " Motion by defendant to advance cause filed.
" " 29. Notice of motion filed.

Said motion and notice are as follows:

In the Supreme Court of Ohio.

OSSIAN D. ASHLEY, THOMAS H. HUBBARD, JAMES F. JOY, and EDGAR T. WELLES
vs.
DANIEL J. RYAN, Secretary of State of the State of Ohio, Defendant in Error.
} No. —. Motion.

11 Now comes the attorney general and moves that this case be taken out of its order on the docket and advanced for hearing for the following reasons:

1st. An officer of the State is defendant and the State is interested in the result of the suit.

2. The constitutionality of a law of the State is involved.

3. The matter at issue is of public concern and public interests require it to be determined at as early a day as practicable.

Oral argument is desired.

J. K. RICHARDS,
Attorney General.

The above motion will be for hearing before the supreme court on Thursday, March 31st, 1892.

J. K. RICHARDS,
Att'y Gen'l.

Service of notice is acknowledged.

SWAYNE, SWAYNE & HAYES,
Attorneys for Plaintiffs in Error.

And afterwards, at the January term, 1892, of said supreme court, to wit, on March 29th—

On application of the plaintiffs in error in the above-entitled case and good cause shown, it is ordered that upon the execution by the plaintiffs in error of an undertaking in the sum of five hundred dollars ($500.00), with sureties to the satisfaction of the clerk of
12 this court, an injunction be, and the same is hereby, allowed in conformity with the prayer of the amended petition filed with the petition in error in this cause.

1892, March 31.—Papers returned, printed record filed.

Said printed record is as follows:

Court of Common Pleas, Franklin County, State of Ohio.

OSSIAN D. ASHLEY, THOMAS H. HUBBARD, JAMES F. JOY, and EDGAR T. WELLS, Plaintiffs,
against
DANIEL J. RYAN, Secretary of State of the State of Ohio, Defendant.

Petition.

(Filed Aug. 15, 1889.)

To the clerk of said court:

On application of the plaintiffs in the above-entitled case and good cause shown, it is ordered that a temporary injunction be,

and the same is, hereby allowed, as prayed for in the within petition, upon the plaintiffs executing an undertaking in the sum of five hundred dollars ($500.00), with sureties to the satisfaction of said clerk and conditioned according to law. This 13th day of August, 1889.

E. P. EVANS, *Judge.*

13 I hereby enter my appearance in the above-entitled action and waive the issue and service of process; I also acknowledge receipt of notice of application for injunction as prayed for in the petition herein.

DANIEL J. RYAN.

Demurrer.

(Filed December 11, 1890.)

Now comes the defendant, by his attorney, and demurs to the petition herein.

DAVID K. WATSON,
Attorney General.

Amended Petition.

(Filed March 1, 1892.)

1. Plaintiffs say that for several years prior to January 1, 1889, the Wabash, St. Louis and Pacific Railway Company was a consolidated railway corporation, composed of several constituent corporations organized, respectively, under the laws of the States of Ohio, Indiana, Illinois, Missouri, and Michigan; and as such owned and operated, as a public carrier, a system of connected railway lines extending from Toledo, Ohio, and Detroit, Michigan, on the east, to St. Louis and Kansas City, Missouri, and to Chicago, Illinois, on the west.

That said Wabash, St. Louis & Pacific Railway Company on or about the first day of June, 1880, as thereto authorized by the laws of Ohio and other States, duly executed and delivered to the Central Trust Company of New York and James Cheney, trustees, a general mortgage upon all its property and franchises, and issued and sold under said general mortgage seventeen million dollars of its general mortgage bonds to divers holders for value, and subsequently thereto, to wit, on or about the first day of June, 1884, said Wabash, St. Louis & Pacific Railway Company defaulted in the payment of interest upon the said bonds.

That, subsequent to said default and in consequence thereof, proceedings were had for the foreclosure of said general mortgage and the sale of all such railway property and franchises in the United States circuit courts for the eastern district of Missouri, for the southern district of Illinois, for the district of Indiana, for the northern district of Ohio, western division, for the eastern
14 district of Michigan, and in said several foreclosure proceedings, under a plan of reorganization entered into by and between the holders of bonds secured by said general mortgage,

executed by said company upon its said lines of railway and franchises and stockholders and creditors, the plaintiffs were, by agreement of said bondholders and stockholders, duly constituted a purchasing committee to purchase as trustees the railways formerly owned by said constituent corporations, and reorganize the said property according to the laws of Ohio and such other States, and they did at the sale of said railways purchase the same to carry out such plan of reorganization and receive proper conveyances therefor.

2. That plaintiffs did thereafter, in furtherance of said plan of reorganization, cause to be organized the Wabash Western Railway Company, under the laws of the State of Missouri, and did thereafter, and on or about the 30th day of September, 1887, duly convey to said railway company, the lines of railway and franchises situated within the State of Missouri, formerly belonging to said Wabash, St. Louis and Pacific Railway Company. The capital stock of such Missouri corporation was $30,000,000.

That the said plaintiffs did also cause to be organized under the laws of the State of Michigan, the Detroit and State Line Wabash Railroad Company, and did, on the 13th day of March, 1889, duly convey to the said railroad company, the lines of railway and franchises situated within the State of Michigan, formerly belonging to said Wabash, St. Louis & Pacific Railway Company. The capital stock of such Michigan corporation was $300,000.

That said plaintiffs did also cause to be organized under the laws of the State of Indiana, the Wabash & Eastern Railway Company, of Indiana, and did, on or about the 23rd day of May, 1889, duly convey to said corporation, thus organized by them the lines of railway and franchises purchased by them, situated in the State of Indiana and being the line of railway and franchises formerly belonging to said Wabash, St. Louis & Pacific Railway Company. The capital stock of such Indiana corporation was $9,000,000.

That said plaintiffs did also cause to be organized under the laws of the State of Illinois, the Wabash, Eastern Railway Company, of Illinois, and did, on or about the 23rd day of May, 1889, duly convey to said corporation thus organized by them, the lines of railway and franchises purchased by them, situated in the State of Illinois and being the lines of railway and franchises formerly belonging to said Wabash, St. Louis & Pacific Railway Company. The capital stock of such Illinois corporation was $12,000,000.

15 That said plaintiffs did also cause to be organized, the Toledo Western Railway Company under the laws of the State of Ohio, and did, on or about the 23rd day of May, 1889, duly convey to the said corporation, the line of railway and franchises purchased by them, situated in the State of Ohio, formerly belonging to said Wabash, St. Louis & Pacific Railway Company. The capital stock of such Ohio corporation was $700,000.

That said several lines of railway connected with each other as follows, to wit: The railroad of the said Toledo Western Railroad Company, of Ohio, extended from Toledo, Ohio, to the western boundary line of Ohio, at a point in Paulding county, and there

connected in continuous line with the railroad of said Wabash Eastern Railway Company, of Indiana. The railroad of the Detroit and State Line Wabash Railroad Company, and of the Wabash Eastern Railway Company, of Indiana, at Butler, in the county of DeKalb, State of Indiana. The railroads of the Wabash Eastern Railway Company, of Indiana, and of the Wabash Eastern Railway Company, of Illinois, at the State line of Indiana and Illinois; the railroads of the Wabash Eastern Railway Company, of Illinois, and the Wabash Western Railway Company at the city of East St. Louis, State of Illinois. The total mileage of all such railroads is 1,921 miles of which only 75 *is* situated in the State of Ohio.

3. Plaintiffs further say that in like execution of said plan of reorganization the board of directors of each of said companies so organized as aforesaid in May, 1889, authorized and directed the president and secretary of each of said companies, to sign, seal, exexecute and deliver an agreement for the consolidation of all of said companies into a single company with a capital stock of fifty-two million dollars, (being the aggregate capital stock of the five contracting companies) to be called the Wabash Railroad Company, a copy of which agreement is herewith attached as "Exhibit A." At a meeting of stockholders of said companies, held in the month of July, A. D. 1889, said agreement of consolidation was duly ratified and approved and every stockholder in each of said companies in writing assented to said agreement of consolidation, and in said month of July, 1889, the said agreement of consolidation was duly filed according to law in the several offices of the secretary of state for the States of Michigan, Indiana, Illinois, and Missouri.

16 4. When the said Toledo Western Railroad Company was organized under the laws of the State of Ohio as aforesaid, it duly paid to the secretary of the State of Ohio, the fees or tax required by law to be paid to such officer, the same being $700, or one-tenth of one per cent. upon the entire capital stock of said Ohio corporation, the same being $700,000.

The entire railroad, lands, structures, improvements, equipment, personal property and assets of every description, situated in the State of Ohio, belonging to said Ohio corporation, was also fully assessed for taxation according to law for the year 1889 and the taxes levied and paid for such year, amounted to the sum of $35,452.55.

Between the date of the organization of said Toledo Western Railroad Company, in May, 1889, and the execution of such consolidation agreement in July, 1889, the said Ohio corporation, as thereto lawfully authorized by the laws of the State of Ohio and the acts of Congress, in that behalf and in due discharge of its duties as a public carrier for passengers and freight, operated the said line of railroad, extending from Toledo, in the State of Ohio, southwestwardly to the western boundary line of such State, to the junction on such State line with the railroad in the State of Indiana, belonging to and then being operated by the Wabash Eastern Railway Company of such State.

As such junction between such railroads was on the State line dividing the States of Ohio and Indiana, the only relation which

such two railroads sustained to each other, was the reciprocal exchange of interstate commerce, as to passengers, freight and express matter and also the United States mails, and such two railroad companies, of Ohio and Indiana, in connection with the beforementioned corporation, organized and owning the railroads in Michigan, Illinois, and Missouri, were between May, 1889, and August of such year, operated as a connected and continuous line of railway, extending from Toledo, Ohio, on the east, to Chicago, St. Louis and Kansas City, Mo., through passenger and freight trains being several times daily forwarded in either direction carrying U. S. mails, persons, freights and expressm atter, and the said Toledo Western Railroad Company, during all such period, held itself out to the public as so being engaged in the business of interstate commerce as aforesaid, as it then and there lawfully had the right to do.

17 5. Thereafter, about August, 1889, the plaintiffs, in further execution of such plan of reorganization and as trustees for said several corporations, who had theretofore executed the said agreement of consolidation at his office at Columbus, Ohio, tendered to the defendant Daniel J. Ryan, who was then and there the secretary of state of the State of Ohio, the said agreement of consolidation and demanded that he should file the same according to the requirements of the statute regulating the consolidation of railroads, and then and there tendered to the said Ryan the sum of $700.00 in full, for his lawful fees for filing such consolidation agreement.

The said Ryan then and there wholly refused to receive the said sum of $700 as and for his lawful fees for filing such agreement of consolidation and refused to receive and file such agreement of consolidation unless there should be paid him, not only one-tenth of one per cent. upon the capital stock of the Ohio constituent corporation, but also one-tenth of one per cent. upon the additional gross capital stock of the corporations of Michigan, Indiana, Illinois, and Missouri, aggregating the sum of $51,300,000. In order to secure the filing of such agreement of consolidation by said Ryan as such secretary of State, the plaintiffs were, on August 1, 1889, compelled under duress and protesting that such charge was illegal, arbitrary, and not authorized by any valid law of the State of Ohio, to pay to said Ryan as secretary of state, the sum of fifty-two thousand dollars, which the said Ryan demanded and received, claiming the said sum to be the legal fees required by the laws of the State of Ohio for filing such agreement of consolidation, and on receipt of such sum of $52,000 the said defendant, as such secretary of state, received and filed such agreement of consolidation.

6. Plaintiffs are advised and believe, and therefore so aver, that the said defendant claims that such charge and exaction of $52,000 was and is a legal fee fixed by law and required to be paid to the secretary of state for filing such agreement under and according to an act of the General Assembly of the State of Ohio, passed Febru-

ary 12, 1889, and entitled "An act to amend section 148*a*
18 of the Rev. Statutes of Ohio, regulating the amount of fees to be charged by the secretary of state for official services.

Whereas the plaintiffs claim and will to the court insist that such enactment is a statute merely attempting to levy a tax and raise revenue for the general purposes of the State, and that the same was and is as applied to such an agreement of consolidation, wholly inoperative and void because contrary to the Constitution of the United States and the constitution of the State of Ohio, and that even if such statute is valid, it cannot be construed to have any extra-territorial force, and therefore the only subject of taxation within the jurisdiction of the General Assembly of Ohio is the $700,000 capital stock of the Ohio corporation, signing such agreement of consolidation.

Wherefore the plaintiffs claim that the sum of $51,300 so demanded of them and received by the defendant was an illegal and wrongful exaction, and that the said sum was demanded and received by the defendant and is now kept by him without right, and that the plaintiffs are entitled to receive the same, as they notified the said defendant that the same was paid under protest and suit would be brought against him to recover the same.

Plaintiffs further say that the said Ryan threatens to pay the said sum, so illegally received by him, into the State treasury when the plaintiffs will be unable to recover the same.

Wherefore the plaintiffs pray that the defendant be restrained from paying the said money into the State treasury until the final hearing, and—

That they also have judgment for a return of the money so unlawfully obtained as aforesaid and for all further proper relief.

SWAYNE, SWAYNE & HAYES,
Attorneys for Plaintiffs.

HENRY CRAWFORD, *Counsel.*

(Verification and certificate attached; also printed copy of articles of consolidation, marked Exhibit "A.")

Demurrer.

(Filed March 1, 1892.)

Defendant demurs to the amended petition because it does not state facts sufficient to constitute a cause of action, or entitle plaintiffs to the relief asked.

J. K. RICHARDS,
Attorney General.

19 *Journal Entry.*

(Filed March 1, 1892.)

Come again the parties, by their respective attorneys, and the court being fully advised upon the demurrer, filed by the defendant, to the original petition herein, does sustain such demurrer and thereupon, on leave of the court, the plaintiffs have leave to file an

amended petition, without prejudice to the existing injunction, and thereupon the plaintiffs file their amended petition.

And the defendant files his demurrer to such amended petition and the court, being sufficiently advised, sustains such demurrer, to which the plaintiffs except, and the plaintiffs, electing to stand by their amended petition as filed, the court renders judgment of dismissal, to which judgment plaintiffs except and give notice of appeal. And thereupon the court fix the amount of the appeal bond at $200.00.

(Correct.) SWAYNE & SWAYNE,
Attorneys for Plaintiffs.

J. K. RICHARDS,
Attorney General.

Transcript of Journal Entries.

(Filed March 5, 1892.)

I, William H. Simonton, clerk of the court of common pleas, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

January Term, March 1, 1892.

Come again the parties by their respective attorneys, and the court being fully advised upon the demurrer, filed by the defendant, to the original petition herein, does sustain said demurrer and thereupon, on leave of the court, the plaintiffs have leave to file
20 an amended petition without prejudice to the existing injunction and thereupon the plaintiffs file their amended petition and the defendant files his demurrer to such amended petition and the court, being sufficiently advised, sustains said demurrer, to which the plaintiffs except, and the plaintiffs, electing to stand by their amended petition as filed, the court renders judgment of dismissal, to which judgment the plaintiffs except and give notice of appeal. And thereupon the court fix the amount of the appeal bond at $200.00.

1889, Aug. 15—Petition affidavit and precipe filed. Temporary injunction allowed. Bond fixed at $500.00.
1889, Aug. 15—Service of summons waived and appearance of defendant entered.
1889, Dec. 11—Demurrer of defendant filed.
1892, March 1—Amended petition filed.
" " " Demurrer of defendant to amended petition filed.
1892, March 1—Demurrer to original petition sustained. Leave to plaintiffs to file amended petition *and* filed. Demurrer to amended petition sustained, cause dismissed at costs of plaintiff. Notice of appeal; bond fixed at $200.00. 79–629.
1892, March 5—Appeal bond filed.

(Duly certified.)

In the Circuit Court, Franklin County, Ohio.

OSSIAN D. ASHLEY *et al.*, Plaintiffs,
against
DAN'L J. RYAN, Sec'y of State, Defendant.

Transcript of Docket and Journal Entries.

(Filed March 28, 1892.)

I, Wm. H. Simonton, clerk of the circuit court, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the docket and journal of said court, to wit:

21 January Term, March 19, 1892.

This cause coming on to be heard on the demurrer of the defendant to the amended petition herein was argued by counsel and submitted to the court. On consideration whereof, the court being fully advised in the premises, finds said demurrer to be well taken and does sustain the same. Thereupon, plaintiffs, not asking and failing to amend or plead further, it is considered that the defendant go hence without day and recover from the plaintiffs his costs, taxed at $——.

(Duly certified.)

In the Supreme Court of the State of Ohio.

OSSIAN D. ASHLEY, THOMAS H. HUBBARD, JAMES F. JOY, and EDGAR T. WELLES, Plaintiffs in Error,
against
DANIEL J. RYAN, Secretary of State of the State of Ohio, Defendant in Error.

Petition in Error.

(Filed March 28, 1892.)

Plaintiffs in error say that at the January term, 1892, of the circuit court of Franklin county, Ohio, defendant in error recovered a judgment by the consideration of said court, against plaintiffs in error, in an action then pending therein, wherein plaintiffs in error were plaintiffs and defendant in error was defendant, the original pleadings and papers and a transcript of the docket and journal entries whereof are filed herewith.

There is error in the record and proceedings of said court in this, to wit:

1st. Said court erred in sustaining the demurrer of defendant in error to the amended petition of plaintiff in error.

2nd. Said judgment was given for said Daniel J. Ryan, secretary of state of the State of Ohio, when judgment ought to have
22 been given for Ossian D. Ashley, Thomas H. Hubbard, James F. Joy and Edgar T. Welles, the plaintiffs in error in this court.

Plaintiffs in error, therefore, pray that said judgment may be reversed, that said demurrer be overruled and that judgment be rendered in favor of these plaintiffs in error as prayed for in said amended petition and that these plaintiffs in error be restored to all things they have lost by reason of said judgment.

SWAYNE, SWAYNE & HAYES,
HENRY CRAWFORD,
Attorneys for Plaintiffs in Error.

(Certificate and verification attached.)

Entry of Appearance.

I hereby waive the issue and service of summons in error and enter my appearance herein.

DANIEL J. RYAN,
Secretary of State, Defendant in Error.

Order for Temporary Injunction.

To the clerk of said court:

On application of the plaintiff in error in the above-entitled case and good cause shown it is ordered that upon the execution by the plaintiff in error of an undertaking in the sum of — dollars ($—) with sureties to the satisfaction of the clerk of this court an injunction be and the same is hereby allowed in conformity with the prayer of the amended petition filed with the petition in error in this cause.

"EXHIBIT A."

Articles of Consolidation.

This agreement, entered into by and between the Toledo Western Railroad Company, a corporation of the State of Ohio, party of the first part; the Detroit and State Line Wabash Railroad Company, a corporation of the State of Michigan, party of the second part; the Wabash Eastern Railway Company of Indiana, a corporation of the State of Indiana, party of the third part; the Wabash Eastern Railway Company of Illinois, a corporation of the State of Illinois, party of the fourth part; the Wabash Western Railway Company, a corporation of the State of Missouri, party of the fifth part, witnesseth:

23 That whereas, the Wabash, St. Louis and Pacific Railway Company was a consolidated railway corporation, composed of constituent corporations organized under the laws of the States of Ohio, Indiana, Illinois, Missouri and Michigan; and as such owned a system of connected railway lines extending from Toledo, Ohio, and Detroit, Michigan, on the east, to St. Louis and Kansas City, Missouri, and to Chicago, Illinois, on the west, the said system, and lines of railway composing the same, being hereinafter more particularly described and in detail set forth.

And whereas, the said Wabash, St. Louis and Pacific Railway Company, on or about the first day of June, 1880, duly executed

and delivered its general mortgage to the Central Trust Company of New York and James Cheney, trustees, and issued and sold under said general mortgage seventeen million of its general mortgage bonds, and *consequently* thereto, to wit, on or about the first day of June, 1884, said Wabash, St. Louis and Pacific Railway Company defaulted in the payment of interest upon the said bonds, and also on or shortly after said date, upon bonds issued by various railway corporations, predecessors to it in the ownership of lines of railway then owned by it, and all of which were secured by mortgages or deeds of trust upon lines of railway held by said company and herein described.

And whereas, subsequent to said default and in consequence thereof proceedings were had for the foreclosure of said general mortgage in the United States circuit courts, for the eastern district of Missouri; for the southern district of Illinois; for the district of Indiana; for the northern district of Ohio, western division; for the eastern district of Michigan; and in said foreclosure proceedings under a plan of reorganization entered into on or about the 15th day of July, 1885, by the holders of bonds secured by said general and collateral trust mortgages executed by said company upon its said lines of railway and other property, Ossian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, were by agreement of said bondholders duly constituted a purchasing committee,

to purchase said railways, and did at the sale of said systems
24 of railways purchase the same as an entirety subject to all mortgages thereon prior to said general mortgage.

And whereas, subsequently thereto, to wit, on or about the — day of ——, 188–, the said Ossian D. Ashley, James F. Joy, Thomas H. Hubbard, Edgar T. Welles, purchasing committee, did, in furtherance of said plan of reorganization, caused to be organized the Wabash Western Railway Company, party of the fifth part, and did thereafter, and on or about the 30th day of September, 1887, duly convey to said corporation the following-described lines of railway situated within the State of Missouri, formerly belonging to said Wabash, St. Louis and Pacific Railway Company, to wit:

All the right of way and railroads formerly of the said The Wabash, St. Louis and Pacific Railway Company, extending from the city of St. Louis, in the State of Missouri, to Kansas City, Missouri, with an extension from Moberly, Missouri, to the State line of Iowa, and a branch from Salisbury, Missouri, to Glasgow, Missouri; together with all the embankments, bridges, turnouts, side tracks, buildings and structures, water tanks, and fixtures, shops, engine and other houses, depots, turn-tables, engines, cars, machinery, tools, ferry and other boats, depot grounds, real estate, pertaining thereto, or belonging to said company, at any of the terminals thereof, franchises, rights, interests, and property, and everything appurtenant to said railroad, or used in connection therewith, together with all rents, issues, profits, credits and choses in action accruing from said railroad and appurtenances, and also the real estate taken in the name of James F. How, as trustee for said company in St. Louis, Missouri; the right to use the bridge over the

Missouri river at Kansas City, Missouri; the right to use certain tracks and depot facilities in the Union depot in Kansas City, Missouri; the right to use certain tracks and depot facilities in the Union depot at Hannibal, Missouri; and also the leasehold interests formerly of the Wabash, St. Louis and Pacific Railway Company, in the following railways and properties, to wit: Boone County and Boonville railway, extending from Centralia to Columbia, in the State of Missouri; Brunswick and Chillicothe railway, extending from Brunswick to Chillicothe, in the State of Missouri; the St. Louis, Council Bluffs and Omaha railway, extending from Chillicothe to Elm Flats, in the State of Missouri; the bridge over the Mississippi river at St. Louis, with tunnel and terminal rights in said city; bridge over the Mississippi river at Hannibal, Missouri; also certain lands and lots adjacent to the lines of railroad aforesaid in Missouri, and particularly described in the report of the special master, bearing date December 29th, 1885, and filed in said cause, the title of which lands and lots was acquired by the receiver in said cause, in the name of James F. How, trustee.

And the said corporation now owns and controls the same.

And whereas, subsequent to the said sale of said railway properties under said general mortgage, a further agreement of reorganization was entered into by holders of bonds issued under all the mortgages upon said lines of railway, and under said agreement bearing date November 21st, 1887, said Ossian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, were likewise constituted a purchasing committee on behalf of the holders of bonds issued under all said mortgages, and were duly authorized to foreclose all the mortgages upon the lines of railway formerly belonging to the Wabash, St. Louis and Pacific Railway Company east of the Mississippi river, and to reorganize the same and to organize a new consolidated corporation with authority to issue new mortgage bonds covering all said lines of railway for exchange for bonds outstanding upon said lines of railway, as in said last-named agreement fully set forth;

And whereas, said Ossian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, acting under said agreement, did cause to be organized under the laws of Michigan, the Detroit and State Line Wabash Railroad Company, and did, on the 13th day of March, 1889, duly convey to said corporation thus formed the following railway lines, to wit:

The railroad formerly designated as the Detroit, Butler and St. Louis railroad, and which thereafter became by purchase and consolidation a portion of the Wabash, St. Louis and Pacific railroad, extending from a point on the Detroit, Grand Haven and Milwaukee railroad, near or at Detroit, where the said railroad formerly designated as the Detroit, Butler and St. Louis railroad as aforesaid, intersects the same, and running thence in a generally southwestern direction through the counties of Wayne, Washtenaw, Monroe and Lenawee in Michigan, and the counties of Fulton and Williams in Ohio; and the county of De Kalb in Indiana to Butler in

the last-named State; and the said corporation now owns and controls the said line of railway.

26 And whereas, in the carrying out of the said agreement of reorganization of November 21st, 1887, the said Ossian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, purchasing committee, caused such proceedings to be had, that in the suit of James R. Jessup and Edward H. Dixon, trustees, *vs.* The Wabash, St. Louis and Pacific Railway Company and others, brought in the United States circuit courts for the southern district of Illinois; for the district of Indiana; for the northern district of Ohio, western division; all the mortgages upon the lines of railway formerly belonging to the Wabash, St. Louis and Pacific Railway Company east of the Mississippi river, and hereinafter more particularly described, were foreclosed and all of said railway lines in the States of Ohio, Indiana and Illinois, save and except the Chicago and Detroit divisions, were, on the 15th day of May, 1889, at the sale held under the foreclosure decrees entered in said cause, purchased as an entirety by said Ossian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, as a purchasing committee: and in the suit of John T. Terry and Henry F. Spaulding *vs.* James F. Joy, *et al.*, pending in the United States circuit court for the southern district of Illinois, said Ossian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, did on the 11th day of March, 1889, also purchase at the foreclosure sale in said cause the line of railway known as the Chicago division, and did receive due conveyance therefor; and said Ossian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, did subsequent to such sale and on or about the 23d day of May, 1889, duly convey to the Wabash Eastern Railway Company of Illinois, party of the fourth part, a corporation organized by them for that purpose, under the laws of the State of Illinois, the following lines of railway, to wit:

The line of railway formerly known as the Great Western railway of 1859, and extending in the State of Illinois from Naples and Meredosia as its western termini through Springfield and Decatur to the boundary line between the States of Indiana and Illinois.

The line of railway formerly known as the Illinois and Southern Iowa railroad, and being and situate between the towns of Carthage in Hancock county, and the junction with the Quincy and Toledo railroad at or near Clayton in Adams county, Illinois. The branch extending from Clayton to Camp point; the branch extending from Carthage to Elvaston.

The line of railway formerly known as the Decatur and East St. Louis railway, and extending from Decatur, Macon county, Illinois, to the Mississippi river at or near East St. Louis.

27 The line of railway formerly known as the Quincy and Toledo railroad and extending from Clayton to the west side of the Illinois river, opposite Meredosia.

The line of railway formerly known as the Hannibal and Naples railroad and extending from Naples, Scott county, Illinois, to the Mississippi river at East Hannibal.

The line of railroad formerly known as the Chicago Division of the Wabash, St. Louis and Pacific Railway Company, and commencing at Effingham, in the county of Effingham, in the State of Illinois, and extending thence northwardly through the counties of Effingham, Shelby, Moultrie, Piatt, Champaign, McLean, Ford and Livingston, to Streator, in the county of La Salle, in said State, with a branch or extension thereof from Shumway to Altamont, in the county of Effingham, aforesaid; the said line of railroad being the same formerly belonging to the Chicago and Paducah Railroad Company, and known as the Chicago and Paducah railroad: also the railroad commencing at Strawn, in the county of Livingston, in said State of Illinois, and extending thence northeasterly through the counties of Livingston, Kankakee and Will to or near the city of Chicago, in the county of Cook, and known as the Chicago and Strawn railway, together with all the terminal rights in the city of Chicago, and all the equipment and all property rights and franchises, appurtenant to each and all of said lines of railway.

All of which lines the said corporation now owns and controls.

And whereas, the said Ossian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles did also cause to be organized under the laws of the State of Indiana, the Wabash Eastern Railway Company of Indiana, party of the third part, and did on or about the 23d day of May, 1889, duly convey to said corporation thus organized by them the following lines of railway purchased by them, to wit: The line of railway in the State of Indiana, extending from the east line of Allen county to the west line of Warren county in said State, and being the line of railway forming a part of the main line of what is known as the Wabash railway; and said corporation now owns and controls the same.

And whereas, the said Ossian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, did also cause to be organized the Toledo Western Railroad Company, party of the first part, under the laws of the State of Ohio, and did on or about the 23d day of May, 1889, duly convey to said corporation a line of railway purchased by them under the proceedings last above named and
28 described as follows: Being a line of railway extending from Toledo, Ohio, to the west line of Paulding county in said State; and said corporation now owns and controls the same.

And whereas, the railroads of the several parties hereto connect with each other as follows, to wit: The railroads of the said Toledo Western Railroad Company, and said Wabash Eastern Railway Company of Indiana, parties of the first and third parties respectively at the State line of Ohio and Indiana, on the west line of Paulding county, Ohio, and the east line of Allen county, Indiana; the railroads of the Detroit and State Line, Wabash Railroad Company and of the Wabash Eastern Railway Company of Indiana, parties of the second and third parts respectively, at Butler, in the county of De Kalb, State of Indiana; the railroads of the Wabash Eastern Railway Company of Indiana and the Wabash Eastern Railway Company of Illinois, parties of the third and fourth parts respectively, at the State line of Indiana and Illinois;

the railroad of the Wabash Eastern Railway Company of Illinois, and the Wabash Western Railway Company, parties of the fourth and fifth parts respectively, at the city of East St. Louis, State of Illinois, and all of said lines will form a continuous and connected line of railway from Toledo and Detroit, on the east, to Chicago, St. Louis and Kansas City on the west, and said lines are not competing nor parallel, and it is considered to be for the advantage of all the parties hereto, and for the benefit of the public, that the lines of railway above described, the franchises and capital stock of all the corporations parties hereto should be united and consolidated and owned and worked in common;

And whereas, the capital stock of the party of the first part amounts to seven hundred thousand dollars, divided into seven thousand shares of one hundred dollars each;

And whereas, the capital stock of the party of the second part amounts to three hundred thousand dollars, divided into three thousand shares of one hundred dollars each;

And whereas, the capital stock of the party of the third part amounts to nine million of dollars, divided into ninety thousand shares of one hundred dollars each;

And whereas, the capital stock of the party of the fourth part amounts to twelve million dollars, divided into one hundred and twenty thousand shares of one hundred dollars each;

And whereas, the capital stock of the party of the fifth part amounts to thirty million dollars, divided into three hundred thousand shares of one hundred dollars each;

29 And whereas, under the agreement of July 15th, 1885, constituting said purchasing committee, it was provided that preferred stock in the new company should be issued to the amount of $23,100,000, and common stock to the amount of $27,300,000, such amounts representing approximately the respective amounts of preferred and common stock of the said Wabash, St. Louis and Pacific Railway Company;

And whereas, the holders of said preferred and common stock have deposited their stock with the said purchasing committee under the said plan of reorganization, and have received certificates evidencing such deposit and the nature and amount of the stock so deposited;

And whereas, it is intended that the stock of said new consolidated corporation shall be issued to the holders of such certificates, to an amount equal to the stock as deposited by them, as being the persons entitled to the same, and as being the equitable owners of the stock subscribed for in each of the corporations, parties hereto, in carrying out the said plan of reorganization:

Now, therefore, in consideration of the premises and of the several covenants hereinafter mentioned by the parties hereto on their part respectively to be performed, and upon and with the unanimous consent and approval expressed in writing of the stockholders of the corporations, parties hereto, it is hereby mutually stipulated and agreed:

First. The terms and conditions of this agreement shall be that

from and after the consummation of this agreement and act of merger or consolidation by the corporations, parties hereto, and filing the same duly certified in the office of the secretary of state of each of the States hereinbefore mentioned, and a certified copy thereof in the office of the recorder of each of the counties through which said lines pass in the State of Illinois, the said corporations, parties hereto, shall be deemed and taken to be one corporation under the name and style of the Wabash Railroad Company.

All the powers, privileges, immunities and franchises in any manner possessed by or vested in either of said original corporations, under their several charters of incorporation, or under the laws of the several States, or as incidental to the railway property of either of said companies, shall be transferred to and vested in said consolidated company. And also all and singular the real estate, depot grounds, rights of way, road-bed, railroad iron, rails, engines, cars, machinery, machine shops, buildings, structures, rolling stock, debts, dues, demands, choses in action and property of every description, name and nature which the said consolidating roads and any or either of them may possess, any rights, and all proprety, real, personal, and mixed, and all choses in action or in possession and all privileges and appurtenances, reversions, and remainders in any or either of said consolidating companies, shall from the day when this agreement shall be ratified by all the parties hereto, and copies filed with the secretary of state of the several States through which said roads pass, and in which the respective parties hereto were incorporated, be, and become vested in the said consolidated company without any further or other deed, transfer, or conveyance in that behalf.

The capital stock of said consolidated company shall be fifty-two millions of dollars, of which twenty-four millions shall be preferred, consisting of two hundred and forty thousand shares of one hundred dollars each; and twenty-eight millions of common stock, consisting of two hundred and eighty thousand shares of one hundred dollars each.

The said stock shall be issued to the holders of certificates evidencing the deposit of stock with the said purchasing committee under the said agreements of reorganization, as follows:

Each person holding a certificate of the deposit of preferred stock of the Wabash, St. Louis and Pacific Railway Company with the purchasing committee under the said plan of reorganization, or with the Mercantile Trust Company as the designated depository of the said purchasing committee, upon the surrender of such certificates to the consolidated company, shall receive a corresponding number of shares of the preferred stock of the consolidated company, each of the par value of one hundred dollars. Each person holding a certificate of the deposit of common stock of the Wabash, St. Louis and Pacific Railway Company with the purchasing committee under the said plan of reorganization, or with the Mercantile Trust Company as the designated depository of the said purchasing committee, upon the surrender of such certificate to the consolidated company, shall receive a corresponding number of shares of the

common stock of said consolidated corporation, each of the par value of one hundred dollars.

31 Second. The mode of carrying this consolidation into effect shall be that upon the ratification of this agreement by the board of directors of either of the corporations parties hereto, the said board shall further appoint a time and place for the submission of this agreement to the stockholders, which shall not be less than sixty days from the date of its approval by the board, and notice of the time and place of such meeting shall be given in each State in the manner provided in the statutes of such State. At such meetings of the shareholders of the corporations parties hereto, upon the ratification of this agreement by the shareholders of either of the corporations parties hereto, the shareholders thereby shall further appoint a time and place for the election of directors and other officers of the new corporation provided for by this agreement, which time and place shall be the same as fixed by all the parties hereto, and not more than six months from the date of such ratification of this agreement. All the shareholders in either of said corporations parties hereto shall be admitted to one vote at said election of the board of directors as shareholders in the consolidated corporation in person or by proxy, each share entitling the holder thereof to one vote. The directors then chosen shall be the directors of the consolidated corporation and immediately upon their organization shall assume, enjoy and possess all powers, rights and privileges now held or enjoyed by the board of directors of either of said corporations parties thereto, and thereupon forthwith all property rights and franchises of whatever name or nature belonging to the parties of the first, second, third, fourth and fifth parts, or either of them shall pass to and be vested in the said new corporation, and the five named corporations shall forever cease and determine. Notice of the time and place of holding such election shall be given by the secretary of each of the corporations parties thereto in such manner as directed by the shareholders of such corporation, and for at least three weeks, unless otherwise directed by all the stockholders of such corporation.

Third. The number of directors of such new corporation shall be thirteen, a majority of whom shall be residents and citizens of the State of Illinois, and all of whom shall be residents of the United States, and such members may be increased to any odd number not exceeding fifteen, by the board with the consent of a majority of the stockholders. They shall choose from their own number a president and first and second vice-presidents, and shall appoint such other officers as may from time to time be required. They shall have power to establish and amend by-laws, one of

32 which shall fix the time and place of the annual meetings of the stockholders and debenture bondholders of the consolidated corporation. The board first elected shall hold office until the next annual meeting of the company and all officers of the corporation shall serve during the pleasure of the board.

In order to carry out the provisions of article thirteen of the reorganization agreement of July 15, 1885, one half of the highest

even number of the board shall be nominated by the debenture bondholders, and the other half by the stockholders, and the parties so nominated shall agree upon the odd member to be elected to the board, who shall be president of the company; and they failing to agree, he shall be nominated by the trustee of the debenture bond mortgage, and the directors so nominated shall constitute and be elected the board of the new company. The manner in which the said nominations shall be made shall be fixed by the by-laws of the company, and also the manner in which the voting powers given to said debenture bondholders shall be exercised.

The first board of directors of the consolidated company, and to act until the first election of directors in the new corporation herein provided for, shall consist of the following persons, viz:

Names.	Residence.
James F. Joy	Detroit, Michigan.
Ossian D. Ashley	New York city, N. Y.
Thomas H. Hubbard	New York city, N. Y.
Edgar T. Welles	Hartford, Connecticut.
George W. Smith	Chicago, Illinois.
Abram M. Pence	Chicago, Illinois.
Charles Henrotin	Chicago, Illinois.
John W. Bunn	Springfield, Illinois.
John Maynard Harlan	Chicago, Illinois.

The board of directors first elected in said new corporation shall have full power to issue bonds of said corporation secured by mortgage upon the property of the new corporation as provided in the plan of reorganization as set forth in the contracts of July 15th, 1885, and November 21st, 1887, viz:

First. First-mortgage bonds to the amount of thirty-four millions of dollars, secured by mortgage upon all the consolidated railway company's lines east and west of the Mississippi river, as pro-
33 vided and set forth in article four of the agreement of November 21st, 1887.

Second. Second-mortgage bonds secured upon said consolidated company's lines of railway and property to the amount of fourteen million of dollars, as provided in article five of agreement of November 21st, 1887.

Third. Debenture bonds to the amount of thirty millions of dollars, bearing interest at six per cent. per annum, payable semi-annually, and perpetual, but dependent upon the income for the interest, which shall not be cumulative and with voting power at the rate of one vote for each one hundred dollars, and with provisions in said bonds and in the mortgages securing the same as pro-

vided in said agreement of reorganization bearing date July 15th, 1885. $3,500,000 of said bonds are preferred as provided in said agreement.

Fourth. It is hereby mutually stipulated by the parties hereto that the holders of preferred stock in the new corporation shall be entitled to a dividend of seven per cent. per annum on their par value from the earnings of said consolidated corporation, before any dividend shall be paid upon the shares of common stock in said new corporation, but after the holders of preferred stock shall have received a dividend of seven per cent. upon the par value of their shares from the earnings of said new corporation for any year, they shall receive no more from the earnings of the company for that year, until a dividend of seven per cent. upon the par value of the common or remaining shares of said capital stock has been paid to the owners and holders thereof, and after that time all dividends shall be distributed alike among the holders of the preferred and common stock of said new company.

Fifth. Five originals of these articles of consolidation shall be signed by the president and attested by the secretary and sealed with the corporate seal of each of the consolidating parties hereto, and this agreement shall be spread upon the records of each company and agreed to by the stockholders of each of the said companies, and one of the said agreements of consolidation, or a certified copy thereof, filed with each of the secretaries of state for the States of Ohio, Michigan, Indiana, Illinois and Missouri.

The stockholders of all of said companies may by mutual agreement at the meetings called to ratify and confirm this agreement, alter or amend any of the provisions hereof, provided the said changes do not conflict with the plan of reorganization as outlined in the contracts of July 15th, 1885, and November 21st, 1887.

34 In witness whereof, this agreement and articles of consolidation have been signed by the presidents, and attested by the secretaries of the said The Toledo Western Railroad Company, The Detroit and State Line Wabash Railroad Company, The Wabash Eastern Railway Company of Indiana, The Wabash Eastern Railway Company of Illinois, and The Wabash Western Railway Company, the respective parties hereto, and sealed with the corporate seals of each of the said companies at a meeting of the board of directors of each of said companies, and in pursuance of resolutions passed by said directors and entered upon the records of each of said companies, as follows:

The Toledo Western Railroad Company on the 27th day of May, 1889;

The Detroit and State Line Wabash Railroad Company on the 23d day of May, 1889;

The Wabash Eastern Railway Company of Indiana on the 21st day of May, 1889;

The Wabash Eastern Railway Company of Illinois on the 21st day of May, 1889;

The Wabash Western Railway Company on the 23d day of May, 1889.

THE WABASH WESTERN RAILWAY CO.,
[SEAL.] By O. D. ASHLEY, *President.*

Attest: J. C. OTTESON, *Secretary.*

THE DETROIT STATE LINE WABASH RAILWAY CO.,
[SEAL.] By O. D. ASHLEY, *President.*

Attest: J. C. OTTESON, *Secretary.*

THE TOLEDO WESTERN RAILROAD CO.,
[SEAL.] By FRANK B. SWAYNE, *President.*

Attest: HENRY E. KING, *Secretary.*

THE WABASH EASTERN RAILWAY CO. OF INDIANA,
[SEAL.] By GEO. W. SMITH, *President.*

Attest: JOHN MAYNARD HARLAN, *Secretary.*

THE WABASH EASTERN RAILWAY CO. OF ILLINOIS,
[SEAL.] By GEO. W. SMITH, *President.*

Attest: JOHN MAYNARD HARLAN, *Secretary.*

35 *Assent of Stockholders to Articles of Consolidation.*

Know all men by these presents, that we whose names are hereto signed, stockholders in the ——, a corporation, duly organized under the laws of the State of —— for the purpose of constructing, operating, owning and maintaining lines of railway in said State, being satisfied that it is for the interest of said railway company and to the advantage of the public at large that the aforesaid company should consolidate its property, capital stock, franchises and rights, together with the —— company of —— and the —— company of —— and the —— company of —— and the —— railway company of ——, said railway companies having their railroads in such connection as to form a connected system of railways and continuous lines from Detroit and Toledo on the east to Chicago, St. Louis and Kansas City on the west, and the laws of the several States of Michigan, Ohio, Indiana and Illinois and Missouri having made provision for such consolidation, and having examined a certain proposed agreement in writing entered into by the directors of the said corporations of the States of Michigan, Ohio, Indiana, Illinois and Missouri hereinbefore named, which agreement was adopted by the board of directors of each of said companies respectively, and entered upon their records, do hereby assent to, adopt and ratify said articles of consolidation as our agreement and act, and the agreement of each and every one of us.

Names.	No. of shares.

36 STATE OF ——, } ss:
—— *County*, }

The undersigned, —— ——, states upon oath that he is president of the —— company of ——, whose principal office is at ——; that at a meeting of the stockholders of said corporation duly called upon sixty days' notice and held at —— on the — day of ——, 1889, to consider and act upon the articles of consolidation of the stock, property, assets, franchises and rights of said corporation with the stock, property, assets, franchises and rights of the —— company of ——, of the —— company of ——, of the —— company of ——, of the —— company of —— the entire body of shareholders assembled in person, and each and every share in said corporation did vote for and approve the said agreement for consolidation which is hereinbefore attached and set forth.

—— ——.

Subscribed and sworn to before me, —— —, 1889.

—— ——,
—— ——.

37 And afterwards, at said January term, 1892, to wit, on April 2d, Ossian D. Ashley *et al. vs.* Daniel J. Ryan, secretary of state. Motion by defendant to advance cause No. 3094 on the general docket. Ordered by the court that said motion be, and the same is hereby, allowed. Request for oral argument noted. 1892, April 11, injunction bond filed.

Said injunction bond is as follows, to wit:

Supreme Court of the State of Ohio.

OSSIAN D. ASHLEY and Others, Plaintiffs in Error, }
vs.
DANIEL J. RYAN, Secretary of State, Defendant in Error. }

We bind ourselves to the said defendant, Daniel J. Ryan, secretary of state, in the sum of five hundred (500.00) dollars, that the plaintiffs in error, Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Wells, shall pay to the said defendant all damages he may sustain by reason of the injunction in this action, if it be finally decided that the said injunction ought not to have been granted.

Toledo, April 7th, 1892.

FRANK B. SWAYNE. [SEAL.]
S. C. REYNOLDS. [SEAL.]

THE STATE OF OHIO, } ss:
Lucas County, }

I, J. P. Bronson, clerk of the court of common pleas of said county, the same being a court of record, within and for said county and State, do certify that the security of the above is, in my opinion, sufficient for the amount specified, and that the signatures thereto are genuine.

38 In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Toledo, this 7th day of April, A. D. 1892.

[SEAL.] J. P. BRONSON, *Clerk.*

This undertaking approved by me this ninth day of April, 1892.

URBAN H. HESTER,
Clerk Supreme Court of Ohio.

1892, April 27. Plaintiffs' brief filed (10 copies).
" May 21. Defendant's printed brief filed.
" " 26. Pl'ffs' printed briefs filed (Watson & Burr).
" " 27. Def't's typewritten reply briefs filed (5).
" June 1. Bill for printing record filed.

And afterwards, at said January term of said supreme court, 1892, to wit, on June 28th—

This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county, and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiffs in error his costs herein expended, taxed at $—. Ordered, that a special mandate be sent to court of common pleas of Franklin county to carry this judgment into execution. Ordered, that a copy of this entry be certified to the clerk of the circuit court of Franklin county " for entry."

39 1892, July 5. Mandate issued.
" Aug. 4. Original papers returned to clerk.
1892, July 11. Writ of error bond filed.

Said bond is as follows, to wit:

Supreme Court of the United States.

OSSIAN D. ASHLEY, THOMAS H. HUBBARD, JAMES F. JOY, and EDGAR T. WELLES, Plaintiffs in Error,
vs.
DANIEL J. RYAN, Secretary of State of the State of Ohio.

Know all men by these presents that I, Frank B. Swayne, of Toledo, county of Lucas, State of Ohio, am held and firmly bound unto Daniel J. Ryan, secretary of state of the State of Ohio, in the sum of five hundred dollars, lawful money of the United States of

America, to be paid to the said Daniel J. Ryan, secretary of state of the State of Ohio; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with my seal. Dated the 26th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Welles have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of Ohio in an action wherein the above-named Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Welles are plaintiffs and Daniel J. Ryan, secretary of state of the State of Ohio, is defendant:

Now, therefore, the condition of the above obligation is such that if the said Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Welles shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

FRANK B. SWAYNE.

Approved:

W. T. SPEAR,
Chief Justice Supreme Court of Ohio.

Opinion of Supreme Court of Ohio.

Supreme Court of Ohio.

ASHLEY *et al.*
v.
RYAN.

Section 148*a*, Revised Statutes, as amended February 12, 1889 (86 Ohio Laws, 33), requiring the payment of a fee to the secretary of state for the filing of articles of agreement of incorporation, and, also, of consolidation, proportioned to the authorized capital stock of the company, is a valid law; and applies to articles of agreement of consolidation between an Ohio company and a company or companies of another State, as well as to articles of consolidation between Ohio companies only.

(Decided July 4, 1892.)

Error to the circuit court of Franklin county.

The action below was commenced in the court of common pleas to restrain the secretary of state, Daniel J. Ryan, from paying into the treasury of the State certain monies, paid him as a fee, for filing in his office "articles of agreement of consolidation" of certain railway companies, which the plaintiffs claim had been wrongfully exacted of them, and having been paid under protest, they also asked a judgment for the return of the money. A demurrer to the

petition as amended having been sustained, the case was appealed to the circuit court, where the demurrer was renewed, and sustained by that court. The ruling and judgment on the demurrer is assigned for error here.

The petition reads as follows:

"1. Plaintiffs say that for several years prior to January 1, 1889, the Wabash, St. Louis & Pacific Railway Company was a consolidated railway corporation, composed of several constituent corporations organized respectively under the laws of the States of Ohio, Indiana, Illinois, Missouri and Michigan; and as such owned and operated, as a public carrier, a system of connected railway lines extending from Toledo, Ohio, and Detroit, Michigan, on the east, to St. Louis and Kansas City, Missouri, and to Chicago, Illinois, on the west.

"That said Wabash, St. Louis & Pacific Railway Company on or about the first day of June, 1880, as thereto authorized by the laws of Ohio and other States, duly executed and delivered to the Central Trust Company of New York and James Cheney, trustees, a general mortgage upon all its property and franchises, and issued and sold under said general mortgage seventeen million dollars of its general mortgage bonds to divers holders for value, and subsequently thereto, to wit, on or about the first day of June, 1884, said Wabash, St. Louis & Pacific Railway Company defaulted in the payment of interest upon the said bonds.

"That, subsequent to said default and in consequence thereof, proceedings were had for the foreclosure of said general mortgage and the sale of all such railway property and franchises, in the United States circuit courts, for the eastern district of Missouri; for the southern district of Illinois; for the district of Indiana; for the northern district of Ohio, western division; for the eastern district of Michigan; and in said several foreclosure proceedings under a plan of reorganization entered into by and between the holders of bonds secured by said general mortgage, executed by said company upon its said lines of railway and franchises, and stockholders and creditors, the plaintiffs were, by agreement of said bondholders and stockholders, duly constituted a purchasing committee, to purchase as trustees, the railways formerly owned by said constituent corporations, and reorganize the said property according to the laws of Ohio and such other States, and they did at the sale of said railways, purchase the same, to carry out such plan of reorganization, and received proper conveyances therefor.

"2. The plaintiffs did thereafter, in furtherance of said plan of reorganization, cause to be organized the Wabash Western
41 Railway Company, under the laws of the State of Missouri, and did, thereafter, and on or about the 30th day of September, 1887, duly convey to said railway company, the lines of railway and franchises situated within the State of Missouri, formerly belonging to said Wabash, St. Louis & Pacific Railway Company. The capital stock of such Missouri corporation was $30,000,000.

"That said plaintiffs did also cause to be organized under the laws of the State of Michigan, the Detroit & State Line Wabash

Railroad Company, and did on the 13th day of March, 1889, duly convey to the said railroad company, the lines of railway and franchises situated within the State of Michigan, formerly belonging to said Wabash, St. Louis & Pacific Railway Company. The capital stock of such Michigan corporation was $300,000.

"That said plaintiffs did also cause to be organized under the laws of the State of Indiana, the Wabash & Eastern Railway Company, of Indiana, and did, on or about the 23rd day of May, 1889, duly convey to said corporation, thus organized by them, the lines of railway and franchises purchased by them, situated in the State of Indiana, and being the line of railway an- franchises formerly belonging to said Wabash, St. Louis & Pacific Railway Company. The capital stock of such Indiana corporation was $9,000,000.

"That said plaintiffs did also cause to be organized under the laws of the State of Illinois, the Wabash Eastern Railway Company of Illinois, and did, on or about the 23rd day of May, 1889, duly convey to said corporation thus organized by them, the lines of railway and franchises purchased by them, situated in the State of Illinois, and being the lines of railway and franchises formerly belonging to said Wabash, St. Louis & Pacific Railway Company. The capital stock of such Illinois corporation was $12,000,000.

"That said plaintiffs did also cause to be organized, the Toledo Western Railway Company under the laws of the State of Ohio, and did, on or about the 23rd day of May, 1889, duly convey to the said corporation, the line of railway and franchises purchased by them, situated in the State of Ohio, formerly belonging to said Wabash, St. Louis & Pacific Railway Company. The capital stock of such Ohio corporation was $700,000.

"That said several lines of railway connected with each other as follows, to wit: The railroad of the said Toledo Western Railroad Company, of Ohio, extend- from Toledo, Ohio, to the western boundary line of Ohio, at a point in Paulding county, and there connected in continuous line with the railroad of said Wabash Eastern Railway Company of Indiana; the railroad of the Detroit and State Line Wabash Railroad Company, and of the Wabash Eastern Railway Company, of Indiana, at Butler, in the county of De Kalb, State of Indiana; the railroads of the Wabash Eastern Railway Company, of Indiana, and of the Wabash Eastern Railway Company of Illinois; at the State line of Indiana and Illinois, the railroads of the Wabash Eastern Railway Company, of Illinois, and the Wabash Western Railway Company at the city of East St. Louis, State of Illinois. The total mileage of all such railroads is 1,921 miles, of which only 75 *is* situated in the State of Ohio.

"3. Plaintiffs further say that in like execution of said plan of reorganization, the board of directors of each of said companies so organized as aforesaid in May, 1889, authorized and directed the president and secretary of each of said companies to sign, seal, execute, and deliver an agreement for the consolidation of all of said companies into a single company with a capital stock of fifty-two million dollars (being the aggregate capitol stock of the five contracting companies), to be called the Wabash Railroad Company, a

copy of which agreement is herewith attached as "Exhibit A." At a meeting of stockholders of said companies, held in the month of July, A. D. 1889, said agreement of consolidation was duly ratified and approved and every stockholder in each of said companies in writing assented to said agreement of consolidation, and in said month of July, 1889, the said agreement of consolidation was duly filed according to law in the several offices of the secretary of state for the States of Michigan, Indiana, Illinois, and Missouri.

"4. When the said Toledo Western Railroad Company was organized under the laws of the State of Ohio, as aforesaid, it duly paid to the secretary of state of Ohio the fees or tax required by law to be paid to such officer, the same being $700, or one-tenth of one per cent. upon the entire capital stock of said Ohio corporation, the same being $700,000.

"The entire railroad, lands, structures, improvements, equipment, personal property, and assets, of every description, situated in the state of Ohio, belonging to said Ohio corporation, was also fully assessed for taxation according to law for the year 1889, and the taxes levied and paid for in such year amounted to the sum of $35,452.55.

"Between the date of the organization of said Toledo Western Railroad Company, in May, 1889, and the execution of such consolidation agreement in July, 1889, the said Ohio corporation, as thereto lawfully authorized by the laws of the State of Ohio and the acts of Congress in that behalf, and in due discharge of its duties as a public carrier for passengers and freight, operated the said line of railroad, extending from Toledo, in the State of Ohio,
42 southwestwardly to the western boundary line of such State, to the junction on such State line with the railroad in the State of Indiana, belonging to, and then being operated by the Wabash Eastern Railway Company of such State.

"As such junction between such railroads was on the State line dividing the States of Ohio and Indiana, the only relation which such two railroads sustained to each other, was the reciprocal exchange of interstate commerce, as to the passengers, freight and express matter and also the United States mails, and such two railroad companies, of Ohio and Indiana, in connection with the before-mentioned corporation, organized and owning the railroads in Michigan, Illinois, and Missouri, were between May, 1889, and August of such year, operated as a connected and continuous line of railway, extending from Toledo, Ohio, on the east, to Chicago, St. Louis and Kansas City, Mo., through passenger and freight trains being several times daily forwarded in either direction carrying U. S. mails, persons, freights and express matter, and the said Toledo, Western Railroad Company, during all such period, held itself out to the public as so being engaged in the business of interstate commerce as aforesaid, as it then and there lawfully had the right to do.

"5. Thereafter, about August, 1889, the plaintiffs, in further execution of such plan of reorganization and as trustees for said several corporations, who had theretofore executed the said agreement of consolidation at his office at Columbus, Ohio, tendered to the defendant Daniel J. Ryan, who was then and there the secretary of

state of the State of Ohio, the said agreement of consolidation and demanded that he should file the same according to the requirements of the statutes regulating the consolidation of railroads, and then and there tendered to the said Ryan the sum of $700.00 in full, for his lawful fees for filing such consolidation agreement.

"The said Ryan then and there wholly refused to receive the said sum of $700 as and for his lawful fees for filing such agreement of consolidation and refused to receive and file such agreement of consolidation unless there should be paid him, not only one-tenth of one per cent. upon the capital stock of the Ohio constituent corporation, but also one-tenth of one per cent. upon the additional gross capital stock of the corporations of Michigan, Indiana, Illinois and Missouri, aggregating the sum of $51,300,000. In order to secure the filing of such agreement of consolidation by said Ryan as such secretary of state, the plaintiffs were, on August 1, 1889, compelled under duress and protesting that such charge was illegal, arbitrary, and not authorized by any valid law of the State of Ohio, to pay to said Ryan as secretary of state, the sum of fifty-two thousand dollars, which the said Ryan demanded and received, claiming the said sum to be the legal fees required by the laws of the State of Ohio for filing such agreement of consolidation, and on receipt of such sum of $52,000 the said defendant, as such secretary of state, received and filed such agreement of consolidation.

"6. Plaintiffs are advised and believe, and therefore so aver, that the said defendant claims that such charge and exaction of $52,000 was and is a legal fee fixed by law and required to be paid to the secretary of state for filing such agreement under and according to an act of the General Assembly of the State of Ohio, passed February 12, 1889, and entitled "An act to amend section 148*a* of the Revised Statutes of Ohio, regulating the amount of fees to be charged by the secretary of state for official services."

"Whereas the plaintiffs claim and will to the court insist that such enactment is a statute merely attempting to levy a tax and raise revenue for the general purposes of the State, and that the same was and is as applied to such an agreement of consolidation, wholly inoperative and void because contrary to the Constitution of the United States and the constitution of the State of Ohio, and that even if such statute is valid, it cannot be construed to have any extra-territorial force, and therefore the only subject of taxation within the jurisdiction of the General Assembly of Ohio is the $700,000 capital stock of the Ohio corporation, signing such agreement of consolidation.

"Wherefore the plaintiffs claim that the sum of $51,300 so demanded of them and received by the defendant was an illegal and wrongful exaction, and that the said sum was demanded and received by the defendant and is now kept by him without right and that the plaintiffs are entitled to receive the same, as they notified the said defendant that the same was paid under protest and suit would be brought against him to recover the same.

"Plaintiffs further say that the said Ryan threatens to pay the

said sum, so illegally received by him, into the State treasury when the plaintiffs will be unable to recover the same.

"Wherefore the plaintiffs pray that the defendant be restrained from paying the said money into the State treasury until the final hearing, and

"That they also have judgment for a return of the money so unlawfully obtained as aforesaid and for all further proper relief."

HENRY CRAWFORD AND
SWAYNE & HAYES,
For Plaintiff in Error.
J. K. RICHARDS,
Attorney General, for Defendant in Error.

A brief was also filed in the case by Merrick & Tompkins, attorneys for the Pittsburgh, Akron & Western Railway Company, who had a like case pending in this court.

A brief was also filed by Watson, Burr & Livesay, attorneys for The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, who had a like case pending in the court of common pleas of Franklin county.

43 MINSHALL, *J.*:

The plaintiffs base their right to relief upon the invalidity of the law under which the money paid by them was exacted by the secretary of state. The statute was passed February 12, 1889, and is an amendment of sec. 148*a*, Revised Statutes, fixing the fees which the secretary of state is required to charge for "official services." It is divided into various paragraphs. The first fixes the fee for filing articles of incorporation of any corporation whose capital stock is over ten thousand dollars, at one-tenth of one per cent. upon the authorized capital of the company.

The third paragraph reads as follows:

"For filing articles of agreements of consolidation of corporations having a capital stock, the following fees shall be collected by the secretary of state: Said articles of agreements of consolidation shall be treated as the articles of incorporation of the new consolidated corporations created by such articles or agreements of consolidation, and the fees for filing such articles or agreements of consolidation, shall be the same in each case as is hereinbefore set forth for the filing of articles of incorporation of a corporation having the same amount of capital stock, as is provided for by the articles or agreements of consolidation for the new consolidated corporation, created by any such articles or agreement of consolidation; and in fixing the amount of such fees, no credit shall be allowed for fees previously paid by any of the constituent corporations, parties to such consolidation, but the same shall be determined solely by the amount of capital stock of the new corporation created by such articles or agreements of consolidation."

The fees are required to be paid into the State treasury, and the secretary is prohibited from filing or recording such articles until the fees have been paid.

The first objection to the statute is, that it imposes a tax, not authorized by the constitution of the State; and the second is, that, as to the plaintiffs, it imposes a burden upon interstate commerce, and is, therefore, in violation of the Constitution and laws of the United States.

1. In support of the first objection the second and fifth sections of the twelfth article of the Constitution, are cited. We think it well settled that the second section simply relates to the taxation of property; and unless it can be shown that the sum exacted of the plaintiffs is such a tax, it has no application to the case. Much stress is placed upon language to be found in the opinions delivered in Exchange Bank *v.* Hines, 3 Ohio Stat., 1. The question there, however, was not as to whether the tax complained of, was a tax on property, but whether the bank was entitled to deduct its debts from its moneys and credits. The decision of that question in no way involved the question as to the limit of the power of taxation conferred on the General Assembly by the general grant of legislative power. This question arose and was fully considered in the subsequent case of Baker *v.* The City of Cincinnati, 11 Ohio St., 544. It was there held that the provision of the constitution requiring all property to be taxed by a uniform rule, was simply a limitation on that mode of taxation, and does not necessarily exclude taxation upon that which is not property, nor cover the whole ground within the limits of the taxing power; and that "if there be a species of taxation, or a subject-matter of taxation, not embraced in that section, there is nothing in it by which they are prohibited or excluded." The learned judge, delivering the opinion, then proceeded to show, that the taxing power is embraced in the general grant of legislative power, and is as ample, except where restrained by express provisions, as the object and purposes of the State government. The doctrine of this case has never been questioned as a sound exposition of the constitution on the subject of taxation, and has since been followed in numerous cases: Gas Light Co. *v.* The State, 18 Ohio St., 242; Telegraph Co. *v.* Mayer, 28 *id.*, 523; Adler *v.* Whitbeck, 44 *id.*, 565; Anderson *v.* Brewster, *id.*, 585; Marmet *v.* State, 45 *id.*, 68.

The recent decision in Railway Company *v.* State, is not in conflict with these cases. There the tax was upon property, levied by its miles in length, and hence not permissible under the provision of the constitution requiring all taxes on property to be levied by a uniform rule according to its true value in money. Whether the sum required by this statute for filing articles of incorporation be termed a fee, a tax or an assessment, is, we think, immaterial, for it is clear that it is not a tax on property. The filing and record of such articles is simply an authority or license to the persons filing them to form a corporation, and the sum paid therefor is the consideration demanded and paid the State for the grant of the right to be a corporation. We fail to perceive anything in the principles of government or sound policy, that should forbid the State from making such an exaction, even for the purposes of general revenue. The franchise is valuable to the corporators, or, it is fair to assume,

it would not be sought; and that the burdens of government are greatly increased by the formation of corporations, is daily seen in the business of the courts and the police establishment of the State. It is further claimed that the exaction made by the statute violates that principle of equality that should underlie all taxation. That this principle should not be disregarded is clear; but perfect equality is not attainable in any system of taxation. This, however, is equal in the sense that it applies to the formation of all incorporated companies, and is imposed according to the amount of the capital of each; and in this respect it is neither unequal nor unusual. Cooley Const. Lim., 608.

14 The fact that it does not apply to companies already formed does not make it unequal. If that were so, then a change in any fee bill, or rate of charges, would be open to the same objection. The law operates upon the future, and its equality must be determined by the future and not the past.

It is also claimed, that the statute is void because it does not state the object for which the tax is imposed, as required by section 5, of article 12, of the constitution. It may be questioned whether this section has any application to the case. Baker *v.* Cincinnati, 11 Ohio St., 544. But, if it does, the objection is met by the provisions of section 181*a*, Revised Statutes, that "all money paid into the State treasury, the disposition of which is not otherwise provided by law, shall be credited by the auditor of State to the general revenue fund." It is not necessary that the object should be stated in the very statute imposing the tax; it is sufficient, we apprehend, if the object distinctly appear from the statute read in connection with some other provision found elsewhere in the statutes of the State. And, if the raising of a fund for general revenue purposes, had been expressed in section 148*a* as amended, the purpose of the exaction would have been no more definitely stated, than it is by reading that section in connection with section 181*a*.

We now inquire whether the statute is a restraint upon interstate commerce, the Wabash Railroad Company as consolidated, embracing a system of roads located in Ohio, Michigan, Indiana, Illinois and Missouri. The power to regulate commerce between the States, belongs without doubt to the Congress of the United States; the States cannot interfere with or regulate it in any way. But the duty of the States in respect to such commerce is negative and not active. No State is under any Federal obligation to furnish highways, nor to create agencies of any kind, for the purpose of facilitating interstate commerce. The grant of the right to be a corporation is within the sovereign discretion of the State, and cannot be controlled by any other power, State or Federal. As it may create or withhold such franchises at its pleasure, it may grant them upon such conditions as best suit its own notions of convenience and policy. Hence the State violates no Federal duty toward non-residents, whether corporate or natural persons, in refusing them corporate franchises or in making an exaction for the grant of the same, simply because such persons may have the control of a system of railways used in interstate commerce.

"The right or privilege," says Justice Field, "to be a corporation, or to do business as such body, is one generally deemed of value to the corporation or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely within the discretion of the State, and of course, when granted, may be accompanied by such conditions as the legislature may judge most befitting to its interest and policy. It may require as a condition of the grant of the franchise and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe." Insurance Co. *v.* New York, 134 U. S., 599. And so, in Monroe Savings Bank *v.* Rochester, 37 N. Y., 365, it is said: "It must be regarded as a sound doctrine to hold that the State in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the State. If the grantee accepts the boon, it must bear the burden."

The fee required to be paid for the filing of such articles can, in no proper sense, be said to be a tax upon the business of commerce between the States. No commodity is taxed directly or indirectly; and the business of the Wabash system is in no way hindered or embarrassed. It is not required to become a consolidated company under the laws of Ohio; nor is the transaction of its business made to depend upon its filing such articles and becoming a corporation. It can continue its business with the same freedom in the State, whether it incorporates or not under its laws. That the franchise of being a corporation under the laws of this State would be fruitful of advantages to those who own and operate the Wabash system may well be inferred from the fact that they are anxious to obtain it. And the State is in no way averse to making the grant; it simply requires that its terms be complied with; and, as we have shown that it is under no Federal obligation to make such grant, there is no ground upon which they can, as we see, object to the terms.

The further claim is made that, by filing the articles of agreement of consolidation of the companies composing the Wabash system, no "new corporation" is created; and therefore the provisions of section 148*a*, as amended February 12, 1889, do not apply to them; that this section only applies where all the companies entering into the consolidation are Ohio companies. If this were so, then the plaintiffs should not have presented their articles to the secretary of state to be filed and recorded. But we are of the opinion that it is not so, and that a new company is formed in the one case as well as in the other. Referring to the Revised Statutes on the subject of "consolidation," it will be observed that section 3379 authorizes the consoli-
45 dation of Ohio companies and that the next authorizes the consolidation of a company in this State with a company in an

adjoining State. The next section, 3381, provides how the consolidation is to be effected, and applies without distinction to either case. It is then provided by section 3382, that when the agreement is made and perfected, and the same, or a copy thereof, is filed with the secretary of state, "the several companies parties thereto, shall be deemed and taken to be one company, possessing in this State all the rights, privileges and franchises of a railroad company." And by section 3384 it is provided that, upon the election of the directors of the consolidated company, all and singular the rights, privileges, franchises and property of the companies who are parties to the agreement, shall be transferred to and vested in the "new company without further act or deed." The result is that by consolidation, whether between Ohio companies or between an Ohio company and companies of another State, a new company is formed by the extinguishment of the old ones. And it has been so determined in a number of cases. Shields *v.* Ohio, 95 U. S., 324; Compton *v.* Railway Co., 45 Ohio St., 592, 615; Lee *v.* Sturges, 46 *id.*, 163, 169.

In the subsequent sections the company formed by consolidation is designated as "the new company." The stockholders of the old company become stockholders in the consolidated company, except such as refuse to convert their stock into the stock of the latter company. One who refuses to do so is paid the highest market value of his stock at any time within six months preceding the making of the agreement, to be determined, where the parties cannot agree, by arbitration. But those who voted for the agreement are estopped to refuse, so that there can*not* be no such thing as a consolidated company without stock.

Many difficulties have been suggested, as arising, if a company, formed by the consolidation of an Ohio company with a company of another State should be held to be a new corporation. We would have, it is claimed, the anomaly of a corporation with a capital stock, without the individual liability of the stockholders. The fallacy consists in the assumption, for such would not be the case. There has been some diversity of opinion as to the status of a corporation formed by the consolidation of companies under the laws of different States. But it seems pretty well-settled, upon principle at least, that where formed under co-operative legislation of the different States, it becomes a corporation in each State where its road is located. It is a legal entity residing and doing business in different States, with a status in each, derived from and determined by the laws of that State. If by the laws of one of these States an individual liability attaches to the holder of stock in an incorporated company, the same liability will attach to its stockholders. The liability will, in this regard, depend upon the laws of the State where it is sued. Whatever may be the holding in other States, there can be no doubt but that in Ohio the stockholders of an incorporated company, however formed, are individually liable for its debts to the extent fixed by statute. The stockholders of the company in the other States, must be presumed to know what the Ohio law is in this regard; and by agreeing to consolidate with an Ohio company, must be presumed to assent to the individual liability at-

tached by Ohio law to the ownership of stock in an Ohio company.

Judgment affirmed.

(To appear in 49 Ohio St.)

STATE OF OHIO, }
City of Columbus, } *ss:*

I hereby certify the foregoing to be a true copy of the opinion of the supreme court of Ohio rendered in the case of Ossian D. Ashley *et al. vs.* Daniel J. Ryan, secretary of state of Ohio, as the same appears on file in my office.

Dated this 7th day of September, A. D. 1892.

LEVI J. BURGESS,
Reporter of Supreme Court of Ohio.

46 THE STATE OF OHIO, }
City of Columbus, } *ss:*

I, Urban H. Hester, clerk of the supreme court of Ohio, hereby certify the foregoing to be a true, full, and correct transcript of the record and proceedings in said supreme court, including a true and full copy of the opinion rendered by said court in the case of Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Welles *vs.* Daniel J. Ryan, secretary of state of the State of Ohio, on error to the circuit court of Franklin county, Ohio.

Witness my name and the seal of said supreme court this 7th day of September, A. D. 1892.

[Seal of the Supreme Court of the State of Ohio.]

URBAN H. HESTER, *Clerk.*

Endorsed on cover: Case No. 15,258. Ohio supreme court. Term No., 888. Ossian D. Ashley, Thomas H. Hubbard, James F. Joy, and Edgar T. Welles, plaintiffs in error, *vs.* Daniel J. Ryan, secretary of state of the State of Ohio. Filed February 10th, 1893.

FILED.
FEB 26 1894
JAMES H. McKENNEY,
CLERK.

156-436

IN THE

Supreme Court of the United States.

Error to the Supreme Court of Ohio.

OSSIAN D. ASHLEY and others, Trustees,
Plaintiffs in Error,

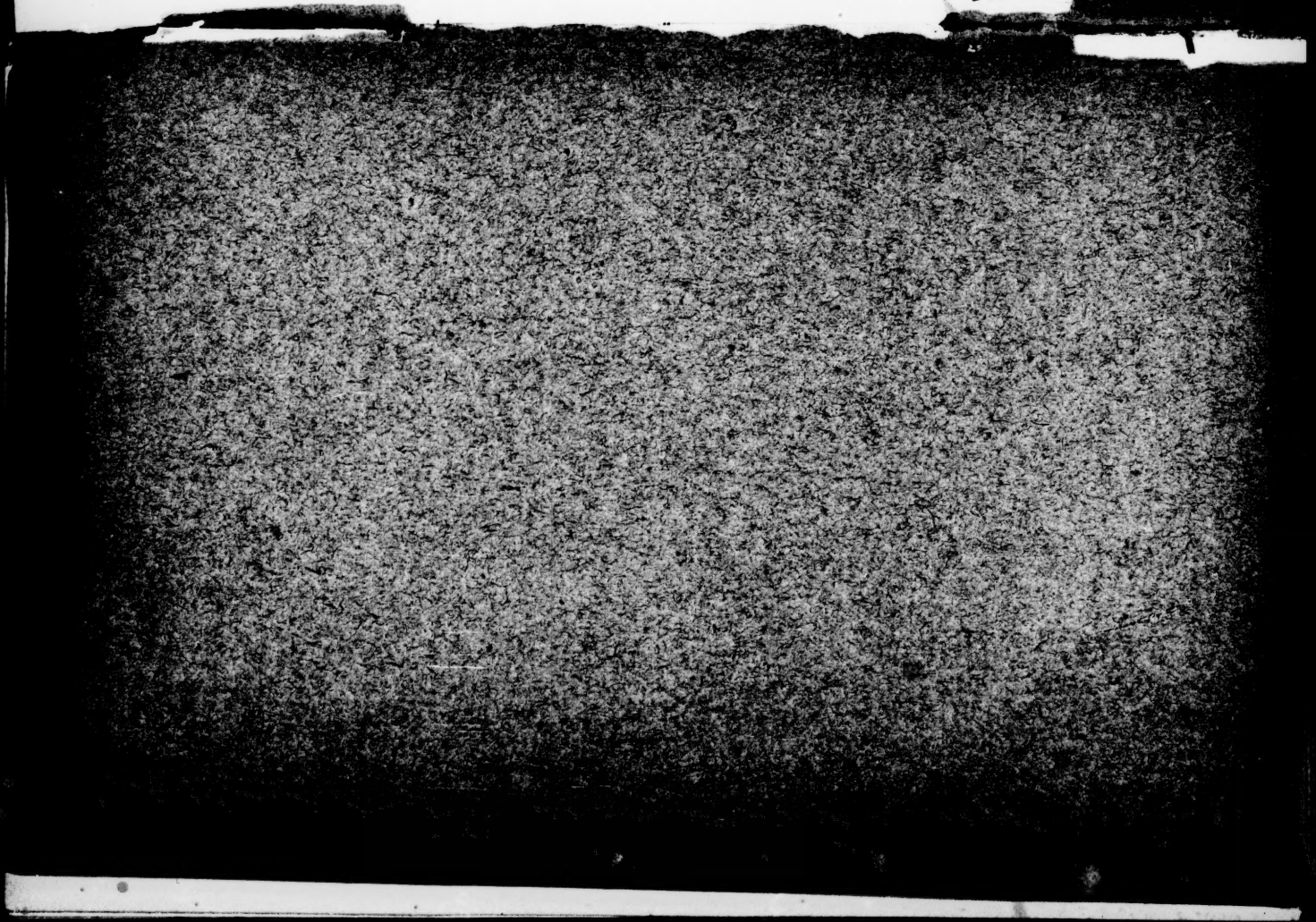
vs.

DANIEL J. RYAN, Secretary of State of Ohio,
Defendant in Error.

Statement and Brief for Plaintiffs in Error.

HENRY CRAWFORD,
Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.



In the Supreme Court of the United States.

ERROR TO THE SUPREME COURT OF OHIO.

OSSIAN D. ASHLEY and others,
Trustees,
Plaintiffs in Error,

vs.

DANIEL J. RYAN, Secretary of State
of Ohio,
Defendant in Error.

Statement of Facts.

The record shows that the plaintiffs in error are trustees charged with the duty of reorganizing the various lines of railway in the Wabash system, which were purchased by them under foreclosure proceedings upon a general mortgage, which covered all its property and franchises in five States—Ohio, Michigan, Indiana, Illinois and Missouri. Prior to June, 1889, they had become the purchasers of all such lines, and had separately conveyed the railway properties in each of the States to a local corporation duly organized by them in each of such States, as follows:

1. The entire railway, franchises, equipment and appurtenances situate in the State of Ohio, extending from Toledo to the western boundary line of Ohio in

Paulding County, had been conveyed by such trustees to the Toledo and Western Railroad Company, a corporation duly organized under the laws of the State of Ohio, having an authorized and issued capital stock of $700,000.

2. The railway, franchises, equipment and appurtenances situate in Michigan, to the Detroit and State Line Wabash Railroad Company, a corporation duly organized under the laws of the State of Michigan, having an authorized and issued capital stock of $300,000.

3. The railway, franchises, equipment and appurtenances situate in Indiana, to the Wabash Eastern Railway Company, of Indiana, a corporation duly organized under the laws of that State, having an authorized and issued capital stock of $9,000,000.

4. The railway, franchises, equipment and appurtenances situate in Illinois, to the Wabash Eastern Railway Company, of Illinois, a corporation duly organized under the laws of that State, having an authorized and issued capital stock of $12,000,000.

5. The railway, franchises, equipment and appurtenances situated in Missouri, to the Wabash Western Railway Company, a corporation duly organized under the laws of Missouri, having an authorized and issued capital stock of $30,000,000.

The total mileage of all the roads is 1,921 miles, of which only 75 are in Ohio. The five roads thus separately owned were in full operation, and constituted an interstate railway system.

On August 1st, 1889, plaintiffs in error tendered to Ryan, who was the Secretary of State

of Ohio, an agreement in writing, duly executed by the proper officers and under the corporate seals of said five corporations, whereby their respective roads became united under the name of the Wabash Railroad Company, with an aggregate capital stock of $52,000,000, being the sum total of the separate capital stocks of the five corporations signing the agreement. A copy of the document is exhibited. It fully sets out the reorganization trust, the judicial sales and the conveyances to the five local corporations in each State, and the amount of the capital stock of each such corporation.

Plaintiffs in error tendered $700 as the proper fee, and demanded that such officer should receive, file and record the paper as required by law.

He refused to accept, file or record such document unless he was first paid $52,000, claiming that under the act of February 12, 1889, Sec. 148a, the fee demandable by law for such official services was one-tenth of one per cent. on the capital stock of $52,000,000, specified in the said agreement so tendered for filing.

In order to procure the Secretary of State to perform his official duty and accept, file and record such paper, the plaintiffs in error were compelled, and did, under protest, pay him the sum of $52,000 to secure the filing and record of the articles.

He was duly notified at the time that such sum was illegally exacted from them and that suit would at once be brought against him to recover it back.

This action was accordingly instituted in the Common Pleas Court of Franklin County, Ohio, for the repayment of the money.

That Court held that the act was valid, the tax prop-

erly exacted, and sustained a demurrer to the petition. This ruling was affirmed both in the Circuit and in the Supreme Court of Ohio. This writ of error is prosecuted from the judgment of the last-named court.

Assignment of Errors.

1. The State Court erred in sustaining a demurrer to the amended petition.

2. It also erred in rendering final judgment against plaintiffs in error.

Brief for Appellants.

The controversy involves the construction and validity of the statute passed by the General Assembly of Ohio on February 12, 1889, purporting to fix the fees to be charged by the Secretary of State for official services.

The general statutes, regulating the incorporation of corporations, provide that all such organization papers shall be filed with the Secretary of State. Rev. Stat. Ohio, Sections 3236, 3379 *et seq.*

Par. 1 of Sec. 148a, approved February 12, 1889, declares that the charge for filing articles of incorporation of any corporation shall be one-tenth of one per cent. "upon the authorized capital stock of such "corporation."

It is then enacted by Par. 3, that articles of consolidation "shall be treated as the articles of incorporation "of the new consolidated corporations created by such "articles or agreements of consolidation and the fees "for filing such articles or agreements of consolidation

" shall be the same in each case as is hereinbefore set " forth for the filing of the articles of incorporation of " a corporation having the same amount of capital " stock," and also that " in fixing the amount of such " fees, no credit shall be allowed for fees previously " paid by any of the constituent corporations parties to " such consolidation, but the same shall be determined " solely by the amount of capital stock of the new cor- " poration created by such articles or agreements of " consolidation."

All facts, showing the separate corporate organization, capital stock and railroads of the five contracting parties and their junction points on the State lines, their subsisting interstate traffic relations and relative mileage are fully set forth in the petition. Prior to the act of merger, the five separately owned railroads had been operated as a continuous line with through trains and were engaged in interstate commerce. It also appears that all the tangible property taxes, chargeable on the railway in Ohio for the year 1889, were regularly listed and fully paid.

The record involves only questions of law arising upon the facts stated in the amended petition which were admitted by the demurrer. Appellants contend that the $52,000 paid by them was illegally exacted under color of official right, and that they are entitled to repayment thereof and interest, except as to $700.

First. No technical objections prevent recovery.

The Ohio statute relating to railways requires that articles of incorporation and consolidation shall be filed with the Secretary of State, so as to furnish public notice of the transaction.

If the parties interested are denied the enjoyment of such plain, statutory right and prevented from performing a statutory duty, unless they submit as a condition precedent to a heavy and illegal exaction, such payment is, in legal contemplation, as involuntary as though it was made to prevent a wrongful seizure of property. The transaction is not closed by any voluntary payment. It is admitted that appellants objected to the charge as illegal, paid the money under protest and notified defendant that suit would at once be brought to recover it back.

The doctrine is well settled that illegal fees and taxes thus paid under compulsion, can be recovered back. The principle was fully ruled in Ohio by the case of *Baker vs. Cincinnati*, 11 Ohio S., 534, wherein the English cases are discussed.

The principle then enforced is stated as follows:

" A payment may be, under circumstances, involun-
" tary and an action brought to recover the money,
" when the position or interests of the party are such
" as to require from another the performance of a duty
" enjoined by law and he is illegally compelled to pay
" money to induce such performance."

The later cases in the same Court fully sustain this view.

Stephen vs. Daniels, 27 Ohio S., 527.
Mayer vs. Tel.Co., 28 *Ibid.*, 521.
Wilson vs. Pelton, 40 *Ibid.*, 306.

The statutes of Ohio, Sec. 5848, expressly authorize a suit to be maintained to recover back any illegal tax paid under protest.

The rule established by this Court is:

" Taxes illegally assessed may always be recovered
" back, if the collector understands from the payer that

" the tax is regarded as illegal and that suit will be in-
" stituted to compel the refunding."

Erskine vs. Van Arsdale, 15 Wall., 75.
Shelton vs. Platt, 139 U. S., 595.
Harmen vs. Chicago, 147 *Ibid.*, 39.

In the lower Court it was fully conceded that it was the judicial duty to examine upon the full merits the question whether the payment complained of was illegally exacted.

Second. The law under which the charge was exacted is not a police regulation, but an attempted exercise of the taxing power of the State, and its construction and validity must be adjudged exclusively on that theory.

Accepting the literal import of its words, Section 148a has no other purpose or effect than to fix the amount of fees which the Secretary of State shall charge for official services for filing the several kinds of documents therein specified.

The Constitution of Ohio, Section 19, Article IV., provides that the State officers (including the Secretary of State) shall receive for their services a stated compensation.

The act has no feature of an ordinary license statute. So far as the Michigan, Indiana, Illinois and Missouri constituent corporations are involved, Ohio cannot possibly exercise any legislative police power over them or their franchises, property or business.

Filing the articles was not a prerequisite to business in Ohio. The Toledo and Western Railroad Company

was already a lawfully organized corporation of that State. It possessed corporate existence and capacity to own and operate its railroad in Ohio, and perform all the duties of a carrier thereon and connect at the State line with the Indiana road.

This vested right was not a mere privilege or occupation, like that of an auctioneer or pawn broker, but constituted a continuing public duty which could not be lawfully surrendered and the performance of which could be enforced by mandamus.

Ordinarily when the State, either directly or through delegated municipal authority, requires licenses to engage in certain employments, for which fees are exacted, the primary purpose is regulation and not revenue and the occupation is unlawful without the permit. Such legislation is almost universally confined to obnoxious occupations, or when the prosecution of the particular business imposes some special burden or expense to the public which the license fee is designed to reimburse.

This is the doctrine of the *License Cases*, 45 Ohio S., 68.

Under such enactments the party has no lawful right to carry on the business until he has paid the fee and procured the license.

There is not a single provision in Section 148a which purports to regulate any of the corporations whose incorporation papers are received on file, even in case of mere domestic creations.

Nor can it be correctly asserted that any fresh right to carry on the business of operating a railroad in Ohio was created by the filing of the articles of consolidation. That right existed as a property right before such filing as fully as thereafter.

Plainly, the statute involved is neither a license law nor does it purport to regulate, in any way, the operation of railroads or any other kind of business.

Its single purpose is to force the payment of a heavy charge nominally as compensation for the mere filing and record of a paper by a State officer.

The Court will judicially note that the charge of $52,000 far exceeds the necessary or reasonable expense or compensation incident to any "official service" actually performed or department expense incurred.

The section also, Par. 19, requires that all such "fees" shall be paid directly into the State treasury.

These tests leave no doubt but that the enactment was passed not for any purpose of regulation but with the distinct object of producing revenue, not for the benefit of the localities situate along the railroads, but for general State purposes.

All the authorities concur that when a statutory charge is laid on an occupation, or a license, privilege or franchise fee is exacted, which is evidently not proportioned to the expense of issuing the license, compensating the officer, maintaining the department or regulating the occupation, but for the primary purpose of producing revenue, the law thereby levies a tax on the privilege or occupation.

This test has the express approval of many courts and is no longer open to debate.

"A license may include a tax or it may not. If the "exaction goes no further than to cover the necessary "expense of issuing it, it does not. But if it is made a "means of supplying money for the public treasury, we "agree with the Court in *State vs. Roberts*, 11 Gill &

" Johns, 506, that it is a tax, is too palpable for dis-
" cussion."

Mays vs. Cincinnati, 1 Ohio S., 268.
Cincinnati vs. Bryson, 15 Ohio, 625.

" If the fee required is intended for revenue, its ex-
" action is an exercise of the power of taxation."

State vs. Hipp, 38 Ohio S., 199.
Adler vs. Whitbeck, 44 *Ibid*, 539.
Railway vs. State, 48 *Ibid*, 189.

The doctrine has been repeatedly enforced by this Court.

License Cases, 5 Wall., 462.
Steam Co. vs. Portwardens, 6 Wall., 31.

In a case involving a law of Virginia prohibiting an attorney from practicing his profession until he had procured a license, for which a charge was made, it was held:

" It is an occupation tax for which the license is
" merely a receipt and not an authority, except in that
" sense, because it is laid and collected as revenue, and
" not merely as incident to the general police power of
" the State."

Royall vs. Virginia, 116 U. S., 572.

This rule holds good as to excise or franchise charges.

Ins. Co. vs. New York, 134 U. S., 599.
Min. Co. vs. Ibid, 143 *Ibid*, 305.

The moneys exacted, although called " fees for official services," are in fact taxes. The construction and validity of the statute by virtue of which they were assessed and collected must, therefore, be judged exactly as though the Legislature had in express terms declared that it was an act " to provide revenue by tax-

ation," as is the form of the Pennsylvania and New York franchise tax laws which have been the subject of decisions in the Courts of those States and here.

The opinion pronounced by the State Supreme Court in this cause sustains the validity of the law and the charge made under it solely upon the ground that the act and its result in this particular instance was a lawful exercise of the taxing power of the State for the sole purpose of producing revenue.

The enquiry, therefore, on this appeal is: Has the State of Ohio lawful power to levy a tax of $52,000 upon the particular corporations, franchises, occupations and transactions which have been subjected to the exaction in the manner set out in the petition?

It will be observed that the statute in controversy does not in any express terms refer either to licenses to foreign corporations to do business in the State or to consolidations between domestic and foreign corporations or by clear words impose any tax or charge upon either of such transactions.

Paragraph 1 refers to the filing of articles of incorporation whereby an original corporation exclusively domestic is created.

The charge exacted of plaintiffs in error was assessed under paragraph 3, which declares that "articles of consolidation" shall be treated as articles of incorporation of a new company, and the tax imposed on filing shall be the same as laid in paragraph 1, on filing original incorporation articles.

Solely because the $700,000 capital stock of the Ohio corporation when added to the separate capital stocks of the separate Michigan, Indiana, Illinois and Missouri corporations aggregated $52,000,000, the Secretary

of State construed the statute to require the collection of a tax of $52,000.

His interpretation of the law was fully approved by the Supreme Court of the State.

Its opinion, which is in the record (p. 31), sustains the validity of the law and the particular tax collected in this instance.

Its conclusions can be fairly stated as follows:

1. The statute is a valid exercise of the taxing power embraced in the general grant of legislative power.

2. It levies not a tax on property, but a money condition or excise for the grant of corporate franchises by the State.

3. The law and its execution in this instance did not impose unequal burdens and did not amount to a regulation of, or tax upon, interstate commerce.

4. Interstate railway consolidations are by the statute subject to a tax upon the aggregate of the separate capital stocks of their constituent members precisely as though they were all domestic corporations.

5. On such union between corporations of different States a single new legal entity is the result of the "co-operative legislation of the different States."

6. By force of such merger between local and foreign companies the entire stock of the combined roads becomes subjected to "the individual liability attached by Ohio law to the ownership of stock in an Ohio company."

Third. This Court should limit the scope of the law and construe it not to authorize the imposition of a unit franchise or organization tax, rated upon the aggregate capital stocks of combined domestic and foreign corporations.

The record shows that property taxes assessed on the railroad in Ohio have been paid:

To procure the filing and record of the consolidating articles $700, which was one-tenth of one per cent. on the capital stock of the Ohio company, was tendered.

Plainly, therefore, the controversy is not to any extent an attempt to evade the fair burden of ordinary property or local franchise taxation.

It cannot be disputed that both as to principle and practical application the opinion below gives the statute an extra-territorial operation, and necessarily involves and seriously affects the franchises, occupation and responsibility of corporations which are not only foreign to Ohio, but, so far as their relations to that State are concerned, are exclusively national instrumentalities engaged in carrying on commerce between the States.

When local Courts interpret State laws so as to injuriously affect interests lying outside its boundaries, the Courts of the United States are not compelled to accept such construction, but are at liberty to fix their own interpretation on the statute.

Pennoyer vs. Neff, 95 U. S., 714.
Pana vs. Bowers, 107 *Ibid.*, 54.
Gonnley vs. Clark, 134 *Ibid.*, 3.
Wilson vs. Seligman, 144 *Ibid.*, 41.

The principle is elementary that the Courts will not accept such an implied reading of the statute as would

render it nugatory or unjust, if its validity and propriety can be assured by a restricted construction.

U. S. vs. Wigglesworth, 2 Story, 369.

"In such cases the justice of the common law will supply the omission of the Legislature."

Kentucky Tax Cases, 115 U. S., 334.

In seeking to fix a correct limitation upon this legislation it is of the utmost importance to observe that it is an Ohio tax law whose sole purpose is the production of domestic revenues which, in the very nature of things, is due exclusively from domestic property, corporations, franchises and occupations. The law must be construed in harmony with that governing principle.

If the construction contended for is adopted it is equally competent for the other four States to pass similar enactments and it would then result that the entire aggregate capital stock, although separately created in each State would, as distinguished from all other taxables, be subjected to five taxes on its full amount.

No law ought to receive a construction which would render possible such an oppressive and unconscionable imposition of special public burdens in excess of usual property taxes. Courts will not assume that such a result was intended by the Legislature.

In considering the true meaning of a Virginia statute taxing railways, this Court held:

"The terms of the act, indeed, include every railroad "and canal company not exempt from taxation by "virtue of its charter, but that language, according to "a general rule of interpretation, must be confined to "corporations deriving their authority from the laws "of Virginia."

Mayre vs. B. & O. R. R, 127 U. S., 117.

It will further aid the proper construction of this law to read it *in pari materia* with Section 3387 of the Ohio Statutes, which is original Section 8 of the act regulating railway consolidations.

It enacts: "*That portion of the road of such consoli-*" *dated company in this State*, and all its real and per-" sonal property shall be listed for taxation in the " same manner as the road and property of other rail-" road companies in this State," and also provides that the proportion of rolling stock taxed shall be based upon the mileage of the road in the State as compared with its whole mileage.

It was held in *Jones vs. Davis*, 35 Ohio S., 474, that the capital stock of a corporation stands as the legal equivalent of the entire corporate property. Any legislation assessing a tax based upon the aggregate share capital of the five united roads would necessarily rest upon the property in each State or the income therefrom, so far as the practical effect of the taxation was concerned.

Such a construction would be wholly inconsistent with and operate as a substantial repeal of Sec. 3387, which in case of interstate consolidations expressly restricts the subjects of the taxing power to that portion of the road in the State, and a mileage proportion of the equipment.

Examining the text of the law itself, it will be found that it deals only with original incorporations and domestic consolidations, and does not in terms refer to foreign corporations or interstate consolidations.

As paragraph 1 only refers to articles of original incorporations, whereby several natural persons become incorporated into a single artificial entity, this necessarily excludes all but purely domestic corporations,

those coming within the definition expressed in *Lee, Treas. vs. Sturges*, 46 Ohio S., 167, "*such corporations* "*as derive their corporate existence and all their powers* "*from domestic law.*"

Paragraph 3 does not specifically fix what fees are to be paid on filing consolidation papers, but declares that they shall be "treated as articles of incorporation," and the fees for filing "shall be the same in each case "as is *hereinbefore set forth* for the filing of articles of "incorparation," etc. "Hereinbefore set forth," refers to paragraph 1, establishing organization fees solely for domestic corporations.

The consolidation of two domestic corporations results in the voluntary surrender of their original charters and the creation by the State of a new corporate body. This is also the original incorporation of a purely domestic organization.

In law, therefore, the declaration in paragraph 3 that the consolidation articles shall be treated as the articles of incorporation of a new company, "created "by such articles, etc.," should properly be restricted to a consolidation between Ohio companies.

Beyond question, paragraph 1, relates only to incorporations wholly domestic.

By reference to paragraph 1, paragraph 3 should be restricted to domestic consolidations, which are wholly domestic incorporations. This reading is in harmony with the theory of the opinion that *the State was levying a tax as a consideration for the grant of franchises strictly domestic*, and not the result of "the co-operative legislation" of several States.

The Supreme Court of Ohio affords a notable instance of this precise construction of a tax law.

"When the General Assembly uses the words 'capital

"'stock or property of any company or corporation "'which is required to list or return its capital or "'property for taxation in this State,' *it refers to that "class of corporations whose entire capital and property "it is possible to require to be listed here.* This is not "possible for a railroad company made up by con- "solidation of an Ohio company with companies of "other States. *As to this feature it is as essentially "foreign as is a strictly foreign corporation holding "property within this State.*"

Lee vs. Sturgis, 46 Ohio S., 167.

The law should be construed exactly as if after the word "corporation" in the first and third paragraphs the words "organized under the laws of this State," were inserted. They are not only reasonably but necessarily implied.

"It is not the mere words of the law," says Plowden, "but the internal sense of it that makes the law."

This natural and restricted interpretation has the support of many express decisions upon similar revenue laws.

In *Treas. vs. Aud. Gen.*, 46 Mich., 224, the taxing officer of Michigan claimed that the entire $50,000,000 capital stock of the consolidated Lake Shore & Michigan Southern Railroad Company, existing in six States was subject to taxation by that State.

The Supreme Court in most explicit words refused to entertain any such construction.

"It cannot be that the Legislature meant to tax other "companies a certain percentage on a capital stock "represented wholly by property within the state, and "then to tax this company the same percentage on a "capital stock represented by property by far the larger

" portion of which was in other States ; especially when " such property is permanent in its nature, and cannot " by any implication of law or legal intendment be held " or deemed to be property which is subject to or pro- " tected by the laws of this State. Indeed, if the intent " of the General Railroad Law had been to bring this " whole property within its provisions concerning taxa- " tion, it would be subject to the objection that the State " was attempting by this law to reach out and subject " to its sovereign power of taxation property situated in " other States, liable and justly liable to taxation there, " and thereby in some degree to shift the burdens of its " own government from the subjects of taxation which " should justly bear them, upon other subjects which " were beyond its jurisdiction, and therefore not sub- " ject to its control for any purpose. For the State " can no more tax the whole capital stock, which repre- " sents the track from Chicago to Buffalo, the rolling " stock and other equipments, that it can tax the whole " track and equipments. The capital stock is taken as a " basis of taxation rather than the road and equiments, " for reasons of convenience ; but whether the one or the " other is selected for the purpose, the limitations of " sovereignty alike apply. The State can tax only " what is within its jurisdiction, whether it be the part " of the road which is within its limits, or the propor- " tion of the stock which represents that part of the " road. There may sometimes be difficulty in deter- " mining what is the just proporition of the stock which " is thus taxable ; but the principle is plain enough, and " it is not likely the State ever intended to disregard it."

This ruling was approved and enforced in *Railway vs. Aud. Gen.*, 53 Mich., 79.

The State of New York enacted a statute in almost

identical terms with the Ohio law levying an organization tax upon corporations by a percentage charge upon the authorized share capital specified in the incorporating articles. The Court of Appeals held in People vs. Rice (11 N. Y. Sup., 249) that domestic consolidations resulted in a single new incorporation and was therefore subject to the franchise tax.

Subsequently the State Auditor assessed a franchise tax of $57,856.25, being one-eighth of one per cent. on the aggregate capital stock of the separate companies existing under the laws of New York, Pennsylvania, Ohio and Indiana, which filed articles of consolidation as the New York, Chicago & St. Louis R. R. Co.

The Court held that the statute did not apply to such an interstate consolidation, and that the tax could not be enforced.

The opinion below declares that the Ohio statutes operate to create "one company" as the result of either domestic or interstate consolidation.

On this point the N. Y. Court of Appeals holds:

"The Consolidation Act of 1869, it is true, assumes, "on the consolidation, not only of domestic corpora- "tions, but of corporations of different states, to transfer "to and vest in the consolidated company formed "under its provisions, all the rights, privileges, ex- "emptions, franchises and property of each of the con- "stituent companies. *But the Legislature of this State "was impotent alone to accomplish this result. It could "not vest the franchises, rights and property of the "Pennsylvania, Ohio and Indiana companies in the con- "solidated company, nor authorize any change or con- "version of the stock of the constituent corporations into "the stock of the consolidated company, nor confer any "exclusive authority for their consolidation.*"

Even assuming that the union of corporations of different States resulted in a new company, it was ruled "that the new corporation would owe its existence "not to the State of New York alone, but to the States "of New York, Pennsylvania, Ohio and Indiana. *It "would not be in any strict, or even just sense, a corpo- "ration 'incorporated by or under any general or special "law of this State,' within Chap. 143 of the Laws of "1886.*"

"We are of opinion that the proper and equitable "construction of the Act of 1886, imposing an organi- "zation tax on railroads incorporated under the laws "of New York does not bring the defendant within its "provisions."

People vs. N. Y., C. & St. L. R. R. Co., 129 N. Y., 474.

Even if the act should be held to apply to interstate consolidations, it should be construed as a *mere re-incorporation* by Ohio of the original corporation of that State with its $700,000 capital.

The tax on this amount was tendered when the articles were offered to the State officer.

This tender was a full satisfaction of all legal obligation to yield domestic revenue upon any just construction of a law levying an original franchise tax.

Fourth. Under the law as construed by the State Court the tax under challenge is in part illegal because it is a unit charge mainly laid upon incorporations and franchises not created or granted by Ohio, or upon business operations carried on outside its boundaries.

(1) Unless restricted by its own Constitution, the policy a State Legislature may choose to adopt in the way of requiring a franchise or occupation tax to be paid as a condition to the creation of corporations under its own laws, rests exclusively in the legislative discretion.

The opinion below is substantially rested upon the doctrine of Ins. Co. vs. New York, 134 U. S., 599, and Savings Bank vs. Rochester, 37 N. Y., 364, which involved the right of the State to levy franchise or excise taxes upon corporations which were strictly domestic and not engaged in inter-state commerce. But as applicable to the precise taxation involved herein, it is declared, upon the authority of those rulings, that Ohio has unlimited discretion not only to levy a single tax on the filing of the consolidating articles between interstate companies, but to require the new consolidated company, as a condition of the continued exercise of the franchise thereby created, "to pay a specific sum to "the State each year or month, or a specific portion of "its gross receipts, or of the profits of its business, or a "sum to be ascertained in any convenient mode which "it may prescribe."

With such a construction the enactment ceases to be a measure of mere local application, and becomes an assertion of an extra-territorial taxing power of a most extraordinary character.

A recital of the condition of these five separate corporations just prior to the filing of the act of merger, will enable this prerogative claim to be justly estimated and condemned.

The Toledo and Western Railroad Company existed as an Ohio corporation, endowed by that State with corporate capacity and every franchise which the State has vested in railway corporations. Its capital stock

was $700,000. Its road was 75 miles long. It was in full operation. At the western state line it connected with the Indiana corporation, owning the road in the latter State.

As expressly authorized by the Acts of Congress, U. S. Rev. Stat., Sec., 5258, it had formed continuous lines with the other four roads, and was then actually engaged in the transportation and exchange at the State boundary of interstate commerce.

The other four corporations were separately created in Indiana, Michigan, Illinois and Missouri.

They were not created or endowed with any of their franchises by Ohio. None of their respective capital stocks were authorized or fixed by any Ohio legislation or charter papers filed in its public offices. None of their property was situate or business conducted within its territory. Their combined roads made a total mileage of 1,846 miles and the aggregate of their separate authorized capital was $51,300,000. The only relation which they held or ever could hold to Ohio or its local corporation was the exchange of interstate commerce at the boundary line.

It is therefore undeniable that up to the filing of the merger contract, while the State of Ohio had the power to levy franchise and property taxes on its domestic company of $700,000 capital, it had no jurisdiction whatever to impose taxation, by any method, direct or indirect, upon these four foreign corporations or upon their property, franchises, capital stock, occupations or income.

To sustain the statute it will be necessary to establish that the making and filing of the articles in Ohio, so radically enlarged the power of the State as to bring these foreign matters within its rightful taxing jurisdiction.

It is false doctrine that the contract of union or the filing thereof changed this non-taxable condition of the franchises and occupations of the four foreign corporations so that their combined capacities became fused into and with the original Ohio company and thereby subject as a single entity, to the taxing power of that State, precisely as though it was in every respect a domestic company. To assert such a result would be to declare that a cession of State sovereignty was effected by a contract between corporations.

The $52,000 exacted by the State was a single tax, charged on filing an agreement executed by one domestic and four corporations of as many different States. What was the exact subject matter of taxation on which that charge was imposed?

There is no claim that it is a tax imposed on property as such. Discarding the pretense of "fees for official service," and considering the real nature of the charge, it is in substance and fact, on the construction fixed by the Court, a tax of $52,000, levied as a unit upon the franchise of a domestic corporation with $700,000 capital stock, as grouped with the franchises and occupations of four foreign corporations with separate capital stock aggregating $51,300,000.

If a proper construction of the act warrants such a charge, it is clear that the taxation is so levied that the chief and inseparable portion of the subject upon which it rests is not within the jurisdiction of the State.

The method of assessment and collection is mere machinery and does not alter the essential legal character of the impost.

Apportioning the tax on the basis of the separate capital stocks, the practical result is the same as if the State officer has assessed in terms a direct tax of $700

for the grant by it of corporate existence to the corporation created by it, and $51,300 for the grant of like franchises by four other States to corporations they created.

The same doctrine of independent State sovereignty which assures to Ohio plenary taxing power over persons, property, franchises and occupations within its territory vests like exclusive authority over the four foreign corporations and their franchises in the States which created them.

Such an organization tax rated upon the whole capital stock expressed in an interstate consolidation is in effect an assessment payable out of the common treasury. If an annual tax the money used to discharge it must necessarily be taken in large proportion from the user of capacities, income of property and results of business done outside the State. This would plainly result in the continued extra-territorial operation of the taxing power of the state. The existence of any such irresponsible power has been repeatedly denied.

The maxim, that taxation is the tribute for the support of government which is imposed in consideration for the protection and privileges which government affords, states the doctrine and its limitation.

Bank vs. Hines, 3 Ohio S., 1.

"All subjects to which the sovereign power of a State "extends are objects of taxation, but those over which "it does not extend are upon the soundest principles "exempt from taxation."

"The sovereignty of a State extends to everything "which exists by its authority or is introduced by its "permission."

Ch. J. MARSHALL in Weston vs. Charleston, 2 Pet., 466.

"If the Legislature of a State should enact that the "citizens or property of another State or country should "be taxed in the same manner as the persons or prop- "erty within its own limits and subject to its authority "or in any other manner whatsoever, such a law would "be as much a nullity as if in conflict with the most ex- "plicit constitutional inhibition. Jurisdiction is as "necessary to valid legislation as to valid judicial "action."

St. Louis vs. Ferry Co., 11 Wall., 423.

And by the New York Court of Appeals, as follows:

"Non-residents' property having no legal *situs* here, "and business not carried on here, are beyond the ju- "risidiction of our State, and are not the subjects of taxa- "tion here. The defendant, being a foreign corporation, "could not be taxed here in reference to its property "situate out of this State and its business not done "here. Nor could it be taxed on account of its corpo- "rate franchise, as that was not given by our laws, but "was dependent upon the laws of the State of its "creation, and had no existence separate therefrom."

People vs. Eq. Trust Co., 96 N. Y., 388.

It was ruled in Oliver vs. Wash. Mills, 11 Allen, 268, that the Legislature of Massachusetts had no power to pass a law requiring domestic corporations to reserve and pay into the treasury of the commonwealth a certain portion of the dividends on shares held by non-residents.

The Northern Central Railway Company was a consolidated corporation, existing and operating a railway in Maryland and Pennsylvania. It issued bonds secured by a single mortgage covering its property in both States.

A revenue law was passed by Pennsylvania imposing a tax of three mills on the dollar on the principal of all such bonds, and required the corporation to withhold the same out of the interest. It was claimed, as against a British subject who was a bondholder, that such taxation was valid, because the debtor corporation was chartered by Pennsylvania, and therefore its obligations were subject to discretionary taxation by the State.

The Supreme Court of that State sustained the law, but its judgment was reversed by this Court.

Its conclusion was "that to permit the deduction of "the tax from the coupons in question would be giving "effect to the acts of the Legislature of Pennsylvania, "upon property and interests lying beyond her juris-"diction."

The opinion thus deals with the very point now under discussion.

"Now, it is apparent, if the State of Pennsylvania is "at liberty to tax these bonds, that, to the extent of "this Maryland portion of the road, she is taxing "property and interests beyond her jurisdiction. This "portion avails her tax-roll as effectually as if it was "situate within her own limits."

And again: "If Pennsylvania must tax bonds of this "description, she must confine it to bonds issued ex-"clusively by her own corporations."

Railroad vs. Jackson, 7 Wall., 262.

The question subsequently arose upon the taxation of foreign-held bonds issued by the Cleveland Painesville and Ashtabula Railroad Company, operating a road in Pennsylvania and Ohio. It was again ruled that the legislation was not a valid or constitutional exercise of the taxing power of the State, but was "*in fact a forced* "*contribution levied upon property held in other States*,

" where it is subjected or may be subjected to taxation " upon an estimate of its full value."

In re Tax on Foreign Held Bonds, 15 Wall., 300.

According to the doctrine of these cases neither the franchises, corporate capacities, occupations or the $51,300 of authorized capital stock of the four railroads not incorporated by Ohio, could be subjected either directly or indirectly to taxation by that State.

If her taxing power could not be legitimately exercised upon these foreign corporations, the filing of the articles of merger could not possibly bring them within its jurisdiction.

Taxation pertains to sovereignty, and does not rest on consent. To levy a tax requires legislative jurisdiction. A corporation cannot possibly execute a contract which could lessen the sovereign taxing rights of the State which gave it life, or create in another commonwealth, a constructive taxing jurisdiction over franchises which it did not bestow, capital stock not issued under its laws and occupations not conducted within its territory.

The States themselves could not alien any portion of the tax power, even by a formal legislative act, except for Federal purposes.

As was expressed by Chief Justice MARSHALL in *McCullough vs. Maryland*, 4 Wheat., the power to tax involves the power to destroy.

To concede, therefore, that Ohio by the filing of this agreement had obtained rightful taxing power over the franchises, capacities, stock and business of the four corporations created by other States, would be to affirm that one State had become vested with unrestricted

power to tax and therefore to destroy franchises created by another sovereign.

In substance this would be a declaration that the legislation of Ohio could rightfully assert supremacy beyond its limits and over the laws of other States, and that, too, not simply as affecting ordinary business occupations, but prerogative franchises derivable only from such other State and pertaining to its own public highways.

The prohibition against any such taxation "is "founded upon the principle which inheres in every "independent government, that it must be free from "any such interference of another government as may "tend to destroy its powers or impair their efficiency."

Railroad vs. Price Co., 133 U. S., 504.

"The power conferred emanates from and is a por- "tion of the power of the government that confers it. "To tax it is not only derogatory to the dignity, but "subversive of the powers of the government and "repugnant to its paramount sovereignty."

Calif. vs. Pac. Ry., 127 U. S., 41.

As was forcibly expressed by Mr. Justice MATTHEWS in the Iowa liquor exclusion case, 125 U. S., 498:

"The act is not an exercise of the jurisdiction of the "State over persons and property within its limits. "On the contrary, it is an attempt to exert that juris- "diction over persons and property within the limits "of other States."

(2) The tax cannot be to any extent sustained upon the theory that it is in part the compensation which the States can impose upon the four foreign corporations as a condition of transacting business within its territory as applied in Paul vs. Virginia, 8 Wall., 168.

Those companies operate their roads in their own States and do no business in Ohio. The opinion sustains the tax in its entirety as a franchise and not as an occupation tax.

Corporations engaged in commerce between the States do not come within the principle ruled in Paul vs. Virginia, and cannot be subjected to either a license or occupation tax.

(3) The construction of this law fixed by the lower Court is distinctly based upon the view that the agreement between these railway companies of five separate States is to be dealt with as a purely domestic transaction, precisely like a merger of two corporations created under Ohio legislation.

This theory is radically unsound.

In exercising its power to create corporations the State can authorize a number of natural persons to become a body corporate and endow them with capacity and powers.

It can also, by apt legislation, authorize two existing domestic corporations to surrender their separate existences and thereby form a new third corporation.

As expressed in *Shields vs. Ohio*, 26 Ohio S., 86: Such a consolidation "is to be regarded in law as a "surrender or relinquishment of the several individual "charters of the companies so uniting and the *accept-* "*ance of a charter de novo from the State.*"

It logically results from the independent sovereignty of the separate States that this doctrine is wholly inapplicable where a so-called consolidation is effected between corporations of different States. It is wholly impossible for them to be converted into a single entity, owing its creation, and therefore subject either to the exclusive or paramount dominion of a single State.

In neither State can it be classed as a mere domestic corporation, or dealt with as subject to the exclusive authority of that sovereign.

An original incorporation is the unaided act of a single sovereign.

Ohio could not empower the four foreign corporations to sign the articles filed, and it could not declare the effect of the merger upon the franchises, capital stock or existence of the corporation created by the separate laws of other States. After the merger Ohio was impotent to resume any franchises or powers which were granted by the four other States, or regulate their exercise or tax their corporate capacities.

The opinion speaks of "the co-operative legislation "of the several States" producing a single new corporation. That is a thing impossible in law.

The Federal Constitution declares, Art. 1, Sec. 10, "No State shall, without the consent of Congress, enter "into any agreement or compact with another State."

Arrangements of this character create in law only a business union and consolidation of interest and management. There is no surrender of franchise or dissolution of the original corporations and no new unit corporation is resultant.

This doctrine is settled by express decision.

It was first adjudged by Mr. Justice STORY in *Farnum vs. Blackstone Canal Co.*, 1 Sumner, 467, wherein he ruled "that such an agreement was not a surrender of "personal identity or corporate existence by either "corporation."

"In the State of Iowa that one *was an Iowa corpora-*
"*tion existing under the laws of that State alone.* The "laws of Missouri had no operation *in Iowa.*"

Mueller vs. Dows, 94 U. S., 447.

The legal nature of such interstate consolidation was discussed in *Nashua R. R. vs. Lowell R. R.*, 136 U. S., 356, which involved the status of a New Hampshire and Massachusetts railway consolidation. That case must properly be regarded as decisive on the Federal question involved.

It was there held :

"The Acts of New Hampshire, whilst in terms au-
"thorizing the two corporations to unite ,did not confer
"any new franchise or right upon either of them."
* * * "The union of names, of officers, of business,
"and of property does not change their distinctive
"character as separate corporations." * * * "To
"each statute, and to the corporation created by it,
"there can be but one legislative paternity."

There remained, therefore, notwithstanding the filing of the articles, five separate corporations with distinct existence, capacities, duties and allegiance in each State depending on its own laws. There was no single corporate existence of the entirety capable of franchise taxation by any one State.

(4) An additional and unanswerable reason exists why the filing of this document cannot be held to have created a new corporation of Ohio, with $52,000,000 capital stock, the proper subject of a State privilege tax.

The constitution of Ohio, Art. 13, Sec. 3, prohibits the formation of any corporation by the Legislature unless provision is made making each stockholder individually liable for corporate debts.

In State vs. Sherman, 22 Ohio S., 411, it was decided that such stockholders' liability was an indispensable element in the creation of all corporations in Ohio, and

that no corporation could possibly exist by the State's warrant without such provision in its organization.

Sec. 3258 was enacted to effectuate the command of the higher law.

This section was a part of the charter of the Toledo and Western Railroad Company, so that the actual individual liability of shareholders under the Ohio law was only $700,000.

Under the laws of the other States, stockholders are wholly exempt from individual liability.

On what possible theory consistent with independent State sovereignty can the opinion be sustained that by force of the consolidation, the Ohio statute imposing personal liability of stockholders upon its domestic company of $700,000 capital become supreme upon the merger of the five roads, so that the holders of $51,300,000 foreign stock included in the joint adventure had also become individually liable. Yet it is clear upon that there is no new Ohio corporation, with $52,000,000 capital stock, subject to be assessed with an Ohio franchise or organization tax unless the legislation of other States has been thus subordinated to Ohio law, and such individual liability attaches to the whole aggregate share capital as thus assessed.

These decisions leave nothing to be added. Applying the principles they declare, to the facts of this record, and the conclusion is unavoidable, that the joinder of the separate companies did not determine the existence or change the identity of the original Ohio corporation. It still continued in existence as an Ohio corporation, with its $700,000 authorized capital stock, and without any new capacity or franchises. There was no creation of a new Ohio corporation with

$52,000,000 authorized capital stock, subject to an organization tax on that amount as a new State grant.

The original corporations of the other States remained as before, created by and subject to control and taxation solely according to the laws of their respective States.

In law and in fact the situation was unchanged. As the separate identity of the constituent companies still remained, they continued to be foreign corporations and the *situs* of their organization, franchises, capital stock and occupation were in other States and wholly beyond the taxing jurisdiction of the State of Ohio.

The total lack of legislative power to tax the combined capital stock of such interstate combinations is most clearly recognized in *Lee vs. Sturges*, 46 Ohio S., 167, and made the basis for taxing the shares in such bodies held by State residents.

The conclusion is thus stated: "In this view, when "the General Assembly uses the words capital stock or "property of any company or corporation which is re- "quired to list or return its capital and property for "taxation, in this State, it refers to that class of cor- "porations whose entire capital and property it is "possible to require to be listed here. This is not "possible for a railroad company made up by consoli- "dation of an Ohio company with companies of other "States. As to this feature it is as essentially foreign "as is a strictly foreign corporation holding property "within the State."

A careful examination of the decided cases will show that the construction placed upon this law is the first recorded instance where a State wherein only a part of an interstate railway was situate has ever attempted to impose an organization, franchise or excise tax

measured upon the aggregate capital stock of the whole enterprise.

Recognizing that in such cases the taxing jurisdiction of a State is not exclusive but concurrent with other States, the assessment of public charges against this class of corporations has always been levied only upon the State's proportional share of the whole property, franchise, stock or earnings.

State vs. Metz, 32 N. J. L., 199.
Pitts. Ry. vs. Com., 66 Penn. S., 73.
Delaware Tax Case, 18 Wall., 206.
Erie vs. Penn., 21 *Ibid.*, 492.
Ill. Tax Law, 92 U. S., 610.
Tel. Co. vs. Texas, 105 *Ibid.*, 460.
West. Un. Tel. vs. Mass., 125 *Ibid.*, 530.
Pull. Co. vs. Penn., 141 *Ibid.*, 18.
Min. Co. vs. New York, 143 *Ibid.*, 305.
Maine vs. Railroad, 142 *Ibid.*, 217.
Sebastian vs. Bridge Co., 21 Ohio S., 451.
Bridge Co. vs. Mayer, 31 *Ibid.*, 317.

If, however, the result of the union was the reincorporation in each State of a new domestic corporation with like capacity and stock interest as the original companies, then the $700 tendered was the lawful organization tax leviable by Ohio and the Court, severing the valid from the illegal assessment, can decree the repayment of the portion unlawfully exacted.

Fifth. Upon the theory that the entire organization tax of $52,000 was assessed only upon the Ohio constituent of the interstate copartnership, the exaction plainly imposes an unequal and discriminating burden in violation of the Fourteenth Amendment.

The State law does not attempt to levy a uniform charge upon all corporations created by the State as compensation for corporate existence and powers.

It only taxes such corporations as organize after the passage of the act.

The power of the State to levy a franchise tax of one-tenth of one per cent. on the share capital of all its own corporations, whether created before or after this law, cannot be denied.

All organizations of the same class in existence prior to the law are allowed to exercise their powers without being subjected to the tax.

It would hardly be contended that a law would be valid which levied an excise on ordinary avocations, to produce general State revenue and yet limited its operation to some arbitrarily selected portion of the class.

A law imposing a revenue tax upon lawyers admitted thereafter to practice, or upon such hotel-keepers, auctioneers or pawnbrokers as newly entered into business, leaving those already engaged in the employments untouched by the taxation, would unquestionably be unequal and void. It would violate the governing principle of uniformity, and create in the untaxed members of the class a special privilege and exemption from taxation, and would unequally apportion the burdens of government.

If the State can lawfully impose a single discriminating franchise tax of this nature, it undoubtedly has power to direct an annual levy of like character, and thus subject to a continuing burden only a portion of a class when all members were in enjoyment of like privileges.

Applied to railway operations, the injustice of such

an exaction is evident. The Court can judicially note that the Lake Shore, Baltimore and Ohio and divers other companies operating railways across the State, in direct competition with the Wabash system, are not subject to this franchise tax.

The record shows this corporate head-money tax was $52,000, while the property tax was only about $35,000.

On the theory that an annual discriminating tax of the same character could be thus lawfully imposed, it would result that some of the railway companies would yearly pay their full share of property taxes, and in addition still heavier franchise taxes, while other corporations owning and operating railways would be wholly relieved of any burden but ordinary property taxes.

The Court should also be advised that, according to the law as expressed in *State vs. Sherman*, 22 Ohio S., 411, a foreign corporation can lawfully build, own and operate a railroad in Ohio, and make use of the same prerogative powers of eminent domain, maintaining, &c., public highways and collecting tolls that are vested in a domestic corporation.

Such a foreign corporation, even if organized after February, 1889, is under no obligation to lodge any charter papers with the Secretary of State, and can, as its laws are interpreted, build, own and operate a railroad in Ohio, without paying any organization, franchise or occupation tax whatever, such as was exacted of these parties as the price of a privilege.

The discriminations necessarily resulting from such a tax law would not only be unjust, but, under the authorities, are *per se* illegal and beyond governmental authority.

"Taxes of this sort must undoubtedly be equal; that

" is, they must operate upon all persons who exercise " the employment so taxed or enjoy the same privileges."

Bank vs. Apthorp, 12 Mass., 252.
Oliver vs. Wash. Mills, 11 Allen, 279.

" Equality of burden " is the principle of the State Constitution. Persons in the same class and property of the same kind, must be subject to the same burden.

Fields vs. Connors, 36 Ohio S., 476.
Cooley on Taxation, 128.
Youngblood vs. Sexton, 32 Mich., 406.
McMahon vs. Palmer, 102 N. Y., 188.
Boyer vs. Boyer, 113 U. S., 689.

If a State has power to levy a privilege or franchise tax, it can, and therefore should, levy it on all persons or corporations of the class, whether they were enjoying the privilege before the law was enacted or not.

People vs. Ins. Co., 92 N. Y., 460.
Cum. vs. Sav. Bk., 5 Allen, 428.
Ins. Co. vs. New York, 134 U. S., 599.

If the legislation in terms or by construction necessarily exempts a portion of the public carriers of the State from any franchise tax upon their corporate existence, and at the same time subjects other carriers to a heavy taxation, whether annual or otherwise, it is in law and fact an unnecessary and therefore an unjust discrimination, expressly prohibited by the Fourteenth Amendment to the Federal Constitution.

That requires that all persons, including corporations, shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

The equal protection of the laws means the protection of equal laws, impartially administered, so that no

greater burdens are laid upon one than upon another in the same calling and condition.

Whitbeck vs. Bank, 127 U. S., 193.
Yick Wo vs. Hopkins, 118 U. S., 357.
R. R. Tax Cases, 9 Sawyer, 165.

The test is: "If any element taken into consider-" ation in the tax on one, is omitted as to another, it is " a discrimination in favor of one and against the " other."

Santa Clara Co. vs. Railroad, 18 Fed., 385.

The share capital of the Ohio corporation was only $700,000. The merger did not increase the aggregate of the stock of the five original companies. Thereafter, as before, the interest of the Ohio constituent of the combined roads was only 700 parts out of a total of 52,000.

Other domestic corporations created after the act were taxable solely on the footing of their own individual capital stock, while the Ohio member of this *quasi* corporate partnership would be forced, as a condition of its existence, to pay tax not alone on its individual capital stock, but also on the entire capital stock of all its business associates, although incorporated by other States.

It is singled out and forced to submit to taxation based on essentially variant and oppressive principles.

It is first taxed by Ohio for the grant of its own corporate existence, exactly as its other corporations are assessed, and in addition it is taxed for the corporate capacity which other States have granted to other companies.

Cummings vs. Bank, 101 U. S., 158.
People vs. Weaver, 100 *Ibid.*, 539.

A corporation of Ohio, purely domestic, with $52,000,000 capital, would have one creator, owe a single allegiance, and could be subjected to but a single franchise tax. If there are five combined corporations, of as many States, with an aggregate capital stock of like amount, they cannot be lawfully subjected to five franchise taxes on such aggregate capital.

Sixth. The tax as laid is in principle and result an unlawful interference with inter-state commerce and necessarily imposes a burden upon national instrumentalities engaged therein.

It is accepted doctrine that the constitutionality of a State tax is to be determined not by the form or agency through which it is to be collected but by the subject upon which the burden is laid. The enactment must be judged by its natural and reasonable effect.

State Freight Tax, 15 Wall, 272.
Maine vs. Railroad, 142 U. S., 217.

Regarding the substance of the exaction, it is undeniably true that the tax approved by the State Court is mainly levied upon franchises, capital stock and occupations created, situate and employed in States other than Ohio as agencies in conducting inter-state commerce.

The interest and share of the corporate capacity granted by and the property situate in Ohio, in the combined roads, measured by the tax standard of proportionate authorized capital stock, is about one-seventy-fifth part of the entirety.

Not only the present exaction, but any and all others hereafter levied on the same principle of taxation, are

necessarily charges upon the common treasury, and are proportionately payable by the Michigan, Indiana, Illinois and Missouri companies.

These burdens are not property taxes, for they own no property in Ohio. They are not as to them franchise taxes, because they were not created by Ohio, or endowed with any capacity or power by that State.

They are not ordinary occupation or business taxes, for their roads are not operated or their business conducted within the territorial limits of that sovereign.

As these four foreign companies can maintain no possible relation to Ohio, except as instruments of interstate commerce, whatever portion of this single tax is exacted from them can be regarded as nothing but a charge for Ohio's permission or license to them to conduct the national traffic in which they are engaged.

Obviously this charge ultimately rests upon interstate commerce, and must be paid out of the receipts therefrom.

"The privilege cannot be separated from the trade, "and cannot be enjoyed unless the trade may be pros- "ecuted."

Gibbons vs. Ogden.

The person subjected to the tax is a mere collector, who in turn exacts it from the transportation income.

Brown vs. Maryland, 12 Wheat., 444.
Cook vs. Penn., 97 U. S., 566.
Crandall vs. Nevada, 6 Wall., 35.

Attempts have been made in every conceivable form to obtain State revenue by indirect methods of taxation, which rest substantially upon interstate commerce, or the occupations and persons directly engaged in conducting it.

In every form, if the objectionable tax did as matter of substance, constitute a money burden on such traffic, it has been declared unconstitutional.

Without indulging in any general discussion of the many decided cases, attention is directed to a selected few which appear to settle the invalidity of the present tax.

In Glos. Ferry Co. vs. Penn., 114 U. S., 196, where the opinion was unanimous, a tax was levied under a Pennsylvania law against a domestic corporation plying a ferry between Philadelphia and Camden, New Jersey. The charge was rated upon the share capital contingent upon dividends.

Divers fundamental principles were announced in the opinion which have never since been to any extent qualified.

They are as follows :

" The power of Congress over commerce between the " States is the power to prescribe the rules by which " it shall be governed, that is, the conditions upon which " it shall be conducted ; to determine when it shall be " free and when subject to duty or other exactions."

" Interstate commerce by corporations is entitled to " the same protection against State exactions which is " given to such commerce when carried on by indi- " viduals."

" Freedom of transportation between the States im- " plies exemption from charges other than such as are " imposed by way of compensation for the use of prop- " erty employed, or for facilities afforded for its use or " as ordinary taxes upon the value of the property."

The non-action of Congress is a declaration that such commerce shall remain free from burdens imposed by State legislation.

In N. & W. Ry. vs. Penn., 136 U. S., 114, the exaction was levied upon a foreign railroad corporation as a license tax for the privilege of maintaining an agency in Pennsylvania to solicit traffic for its road.

The tax was declared void because it was in effect a burden upon business, and the State did not have the power under "the guise of a license tax to exclude "from its jurisdiction a foreign corporation engaged in "intersiate commerce or impose any burdens upon "such commerce within its limits."

To like effect is :

McCall vs. Cal., 136 U. S., 104.

In Leloup vs. Mobile, 127 U. S., 640, the taxation was attempted by way of license for conducting a telegraph business within the city, and the Court said, in declaring the tax unconstitutional :

"We fail to see how a State can tax a business occu- "pation when it cannot tax the business itself. Of "course, the exaction as a condition of doing any par- "ticular business is a tax on the occupation, and the "tax on the occupation of doing a business is surely a "tax on the business."

It was also ruled in Crutcher vs. Kentucky, 141 U. S., 47, that a license law, which was passed for mere regulation and not for revenue, was void, because the privilege of conducting interstate commerce was not a privilege or right derivable from the State and, therefore, it could not even require a license to engage in such occupation.

In Steamship Co. vs. Penn., 122 U. S., 342, a tax was levied of eight-tenths of one per cent. of the gross receipts of a domestic corporation operating a ferry between Pennsylvania and New Jersey.

The charge was justified either as a corporate franchise or a business tax.

"It certainly could not have been intended as a tax "on the corporate franchise, because by the terms of "the act it was laid equally on the corporations of other "States doing business in Pennsylvania. If intended "as a tax on the franchise of doing business, which in "this case is the business of transportation in carrying "on interstate and foreign commerce, it must clearly "be unconstitutional."

The taxes involved in Tel. Co. vs. Mass., 125 U. S., and Pullman vs. Penn., 141 U. S., 18, although laid in some respects as excise taxes, were sustained as being in substance property taxes on a proportionate amount of tangible property situate within the taxing jurisdiction.

The tax sustained in Maine vs. Railway, 142 U. S., 217, was an annual franchise charge in lieu of all property taxes *laid on the capital stock according to the mileage proportion of the railroad in the State.*

The doctrine clearly held in these cases is that a State has no power to prevent a corporation organized in another jurisdiction, and engaged in the transportation of interstate commerce, from maintaining its office, making contracts and conducting such business within the territory, nor can it lawfully require a license for or levy a tax upon the franchise or occupation of such foreign corporation or the interstate traffic it transports or the revenue thereof.

The exaction on appellants can be validated only when it is declared lawful for Ohio to stand as a tax collector upon her State boundaries and license, regulate and take State toll upon commerce which is

handled across her frontiers either by natural or artificial highways.

If the validity of this tax is sustained, the State of Ohio holds a plenary power of levying franchise taxes upon the entire capacity of the five combined corporations and necessarily operative upon the business they conduct.

"The taxes which may be imposed may embarrass, "impede and even destroy such commerce with the "citizens of the State. If such a tax can be levied at "all its amount will rest in the discretion of the State. "It is idle to say that the interest of the State would "prevent oppressive taxation. Those engaged in "foreign and interstate commerce are not bound to "trust to its moderation in that respect—they require "security."

Ferry Co. vs. Penn., 114 U. S., 196.

In resisting the acceptance of so dangerous a doctrine the interests assailed have the right to stand upon the very boundary of their constitutional right. As was wisely stated by Mr. Justice BRADLEY in the opinion in Boyd vs. U. S., 116 U. S., 635 :

"Illegitimate and unconstitutional practices get their "first footing that way by silent approaches and slight "deviations from legal modes of procedure."

HENRY CRAWFORD,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1893.

No. 888.

OSSIAN D. ASHLEY, THOMAS H. HUBBARD, JAMES F. JOY, AND EDGAR T. WELLES,
Plaintiffs in Error,

VS.

DANIEL J. RYAN, SECRETARY OF STATE, OF THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

J. K. RICHARDS,
Attorney General of the State of Ohio.

COLUMBUS, OHIO.
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STATEMENT.

The Wabash, St. Louis and Pacific Railway Company, a consolidated company, owning and operating lines of railway through the States of Ohio, Indiana, Illinois, Missouri and Michigan, having, in the year 1884, defaulted in the payment of interest on its bonds, foreclosure proceedings were had in the Federal Courts in the several States, for the sale of the road. Pending these proceedings, under a plan of reorganization entered into by the stockholders, bondholders and creditors of the road, the plaintiffs in error,

Ossian D. Ashley of New York City, Thomas H. Hubbard of New York City, James F. Joy of Detroit, Michigan, and Edgar T. Welles of Hartford, Connecticut, were constituted a purchasing committee to purchase, as trustees, the road at the several sales, and reorganize the property after the plan agreed upon. Accordingly, prior to June, 1889, they purchased the lines of road constituting the Wabash System, and conveyed the railroad property in each State to a corporation organized by them therein, for the ultimate purpose of consolidating these various companies, and the lines of railway thus conveyed to them, into one corporation and one railroad property and system.

The following were the constituent companies thus organized:

In Ohio, The Toledo and Western, capital stock, $700,000.00.

In Michigan, The Detroit and State Line Wabash, capital stock, $300,000.00.

In Indiana, The Wabash Eastern, of Indiana, capital stock, $9,000,000.00.

In Illinois, The Wabash Eastern, of Illinois, capital stock, $12,000,000.00.

In Missouri, The Wabash Western, capital stock, $30,000,000.00.

The aggregate capital stock was $52,000,000.00.

These temporary corporations, created merely to serve as steps to the creation of one consolidated corporation, then entered into articles of consolidation, (*see Record*, printed pages 13 *to* 24) by which it was provided, that, upon the filing of the same in the office of the Secretary of State of each of the States mentioned, "*the said corporations, parties hereto, shall be deemed and taken to be one corporation under the*

name and style of The Wabash Railroad Company," (*Record,* top of page 19), in which thereupon should vest all the privileges, franchises and property of the constituent companies.

It was further provided, that "*the capital stock of said consolidated company shall be fifty-two millions of dollars.*" (*Record,* middle page 19.)

Provision was made for the election of directors of the consolidated company. Then follows this provision (*Record,* middle page 20):

"The directors then chosen shall be the directors of the consolidated corporation, and immediately upon their organization shall assume, enjoy and possess all powers, rights and privileges now held or enjoyed by the Board of Directors of either of said corporations, parties thereto, and thereupon forthwith all property, rights and franchises of whatever name or nature belonging to the parties of the first, second, third, fourth and fifth parts, or either of them shall pass to, and be vested in the said new corporation, *and the five named corporations* [meaning the constituent companies] *shall forever cease and determine.*"

On the first of August, 1889, the plaintiffs in error presented these articles of consolidation to Daniel J. Ryan, Secretary of State, of the State of Ohio, and requested him to file them, so that thereby, the proposed consolidated corporation, The Wabash Railroad Company, with its fifty-two millions of dollars of capital stock, might be created under Ohio law.

In filing articles of incorporation, certificates of the increase of the capital stock of incorporations, or articles of consolidation of corporations, whereby new or additional corporate franchises are granted by the State, the Secretary of State of Ohio is governed by the act of February 12,

1889, (86 O. L. page 33), commonly known as the Massie law, being Section 148*a* of the Revised Statutes of Ohio, which prescribes the fees to be charged.

The portions of 148*a* involved in this case, are as follows:

"SEC. 148*a*. The Secretary of State shall hereafter charge and collect the following fees for official services:

1. For filing the articles of incorporation of any corporation whose capital stock is ten thousand dollars or under, ten dollars; of a corporation whose capital stock is over ten thousand dollars, one-tenth of one per cent. upon the authorized capital stock of such corporation.

2. For filing a certificate of increase of the capital stock of any corporation having a capital stock where the amount of the increase is ten thousand dollars or under, ten dollars; where the amount of increase is over ten thousand dollars, one-tenth of one per cent. upon the proposed amount of increased capital.

3. For filing articles of agreements of consolidation of corporations having a capital stock, the following fees shall be collected by the Secretary of State: Said articles of agreements of consolidation shall be treated as the articles of incorporation of the new consolidated corporations created by such articles or agreements of consolidation, and the fees for filing such articles or agreements of consolidation, shall be the same in each case as is hereinbefore set forth for the filing of articles of incorporation of a corporation having the same amount of capital stock, as is provided for by the articles or agreements of consolidation for the new consolidated corporation, created by any such articles or agreement of consolidation; and in fixing the amount of such fees, no credit shall be allowed for fees previously paid by any of the constituent

corporations, parties to such consolidation, but the same shall be determined solely by the amount of capital stock of the new corporation created by such articles or agreements of consolidation."

* * * * *

19. * * * "And all fees herein established shall be paid into the State Treasury, as provided in said original section; and the Secretary of State shall neither file nor record any of the articles of incorporation, certificates or other papers hereinabove referred to, unless the fees for filing same are first duly paid."

The fees collected under this section are required to be paid into the State Treasury of Ohio, and by section 181*a*, are to be credited to the general revenue fund.

Acting under this section 148*a*, the Secretary of State required the fee of fifty-two thousand dollars, being one-tenth of one per cent. upon the authorized capital stock of fifty-two millions of dollars of the consolidated company, to be paid him before filing the articles of consolidation.

The plaintiffs in error tendered seven hundred dollars, being one-tenth of one per cent. on the capital stock of the Ohio constituent company, and demanded the filing of the articles of consolidation. The Secretary of State insisted that under the law, the fee must be determined solely by the amount of the capital stock of the consolidated company. Accordingly, in order to procure the filing of the articles of consolidation, and the creation of the consolidated company, the plaintiffs in error paid under protest, the sum of fifty-two thousand dollars; but immediately brought suit in the Common Pleas Court of Franklin County, Ohio, to recover the money back, claiming the exaction was illegal and unconstitutional. Pending the determination of the suit a tem-

porary injunction was allowed, restraining the Secretary of State from covering the sum into the State Treasury.

A demurrer to the petition as amended having been sustained by the Common Pleas Court, the case was appealed to the Circuit Court of Franklin County, Ohio, where the demurrer was renewed and sustained by that Court, and judgment of dismissal rendered in favor of the State.

The judgment of the Circuit Court was affirmed by the Supreme Court of Ohio. *Ashley, et al.*, vs. *Ryan*, 49 O. S., 504.

This writ of error is for the purpose of reviewing the judgment of the Supreme Court of Ohio.

Points Made in Ohio Courts for Railway Company.

On behalf of the plaintiffs in error, it was contended in the Ohio Courts:

1. That the fee was paid, under compulsion, to secure the enjoyment of a statutory right, and therefore was paid involuntarily, and can be recovered back.

2. That the Massie law levies a tax for general revenue, in contravention of the Constitution of Ohio, because,

(*a.*) It does not "state distinctly the object of the tax, to which only it shall be applied," as required in Section 5, Article 12, of the Constitution of Ohio.

(*b.*) Because Section 2, of Article 12, of the Constitution of Ohio, requires all taxes for general revenue to be levied on property, by a uniform rule, according to its true value in money, and this tax is not so levied.

(*c.*) The franchise tax levied is imposed only upon incorporations or consolidations, filing articles after the passage of the act, and therefore is not uniform in its operation, dis-

criminating in favor of corporations or consolidations formed before the date of its passage.

3. That, as applied to an interstate railroad consolidation, the exaction of this fee violates the Constitution of the United States, because,

(*a.*) The filing of the Articles of Consolidation in Ohio does not create any new corporation under Ohio laws, but the constituent companies still retain the franchises, possess the property, and exercise the rights and privileges they did before the consolidation.

(*b.*) Therefore, to exact the fee based on the capital stock of the consolidation, in effect levies a tax upon the franchises, capital stock and property of corporations created and existing outside of Ohio; and

(*c.*) Since these foreign corporations, along with the Ohio constituent corporation, are engaged in interstate commerce, the exaction of the fee, and levying of the tax, amounts to a regulation of, and burden upon interstate commerce; and hence,

(*d.*) The act ought to be construed so as to require the fee to be measured by the capital stock of the Ohio constituent company alone, leaving out of account the amount of capital stock of foreign companies included in the consolidation.

Points made in Ohio Courts for the State.

On behalf of the Secretary of State, that is, the State of Ohio, it was insisted in the Ohio Courts:

1. The fee was paid voluntarily and cannot be recovered back. If the plaintiffs had any statutory or other right to file these articles and form a consolidated company under

the laws of Ohio, without paying the fee fixed by the statute and required by the Secretary of State, they could and should have enforced this right by proceedings in mandamus to compel the Secretary of State to file the articles upon the payment of the fee which they tendered and conceded to be due.

2. The Massie law, exacting a fee for the grant of corporate franchises, does not violate the Constitution of Ohio, because—

(*a.*) The act does not levy a tax within the meaning of section 5, article 12; but if it does, section 181*a*, which requires money thus paid into the State Treasury to be credited to the general revenue fund, defines the object of the tax;

(*b.*) The limitations of section 2, article 12, apply only to the taxation of property, and do not preclude the Legislature of Ohio from using other modes of raising money for general revenue purposes;

(*c.*) The granting of corporate franchises resting entirely within the discretion of the State, the General Assembly, under the power to regulate corporations, may exact a contribution to the State as a condition of the grant of the corporate franchise;

(*d.*) The raising of revenue being a recognized purpose of government, the General Assembly, under the general grant of legislative power, may exact this contribution, which is not imposed on property, but charged for franchises, and is equal and uniform, exacted from all obtaining corporate privileges, and in proportion to the extent of the privileges obtained, as measured by the capital stock, the distinguishing feature of corporate existence.

(*c.*) An equal and uniform contribution is required, because there is no tax imposed upon the franchise, which, when incorporated, the company may exercise, but merely a charge for the franchise of becoming incorporated, and this charge is exacted of all seeking such privilege, and in proportion to the privilege granted, as measured by the capital stock.

3. As applied to an interstate railroad consolidation, the exaction of the fee does not violate the Constitution of the United States, because—

(*a.*) The effect of filing articles of consolidation in Ohio is to create a new corporation. For the franchise thus granted, the charge under the act is made.

(*b.*) The exaction of this fee for a franchise which Ohio alone can grant, in no way interferes with or places a burden on interstate commerce. No tax or burden is imposed, directly or indirectly, upon the franchises outside of Ohio, or the property or the business of the Wabash System. The charge is for the privilege of consolidation under the Ohio statutes, and for that alone. The only interference is with the privilege to consolidate, and the State may not only interfere with, but destroy that privilege if it choose.

(*c.*) The terms of the act permit of only one construction, that placed on it by the Secretary of State; the fee for filing articles of consolidation must be measured by the capital stock of the consolidated company.

Decisions of the Ohio Courts.

The Common Pleas Court of Franklin County delivered no written opinion.

The Circuit Court of Franklin County, an intermediate court between the Common Pleas and the Supreme Court of

Ohio, delivered an opinion (See 6 Ohio Circuit Court Reports, page 208) which, being short, is printed as an appendix to this brief.

The Circuit Court did not consider or pass upon the constitutional questions raised, but sustained the demurrer on the ground that when money is paid to the Secretary of State by railroad corporations upon the filing of articles of consolidation, such payment is voluntary, though made under formal protest, and the money paid cannot be recovered back.

The gist of the decision is in the following paragraphs:

"In the cases before us (there were cases of incorporations and consolidations), the payment was demanded by the defendant (the Secretary of State) in pursuance to the terms of the statute, and as a condition to the filing of agreements and certificates which were not necessary to the continued exercise of any right which the plaintiffs theretofore had. Without it the plaintiff corporations could continue in the exercise of all the franchises theretofore acquired, and the other plaintiffs could continue in the unrestricted exercise of all their natural rights."

"These suits seek to place the Secretary of State in the positon of an involuntary trustee, and to charge him with the responsibility for the safe keeping of large sums of money in which he has no personal interest, and for whose safe custody in his office no appropriate means are provided. Considerations of policy and justice forbid that a public officer strictly pursuing the line of duty prescribed by the legislature, should be unnecessarily and thus seriously harrassed. These extraordinary proceedings are wholly unnecessary. If, as the plaintiffs claim, the legislature was without power to prescribe these exactions as conditions to the

right of natural persons to become bodies corporate, and of existing corporations to consolidate, it was their plain right, upon tender of the fees prescribed by former statutes and his refusal to accept them and file the agreements and certificates, to institute proceedings in mandamus to compel the performance of that duty. Since they chose not to pursue that course, but instead to make the payment prescribed by the statute, they have waived their right, at least as against the Secretary, to contest the power of the Legislature to make the imposition."

The decision of the Supreme Court of Ohio is to be found in the Record, pages 26 to 36. This decision was rendered after full argument and careful consideration, briefs being filed against the law not only by counsel for the Wabash System, but also by counsel for the Pennsylvania Company and the Pittsburg, Akron and Western Railway Company, who had similar suits pending.

The Supreme Court of Ohio did not consider or pass upon the question as to whether the payment of the fee was or was not voluntary in the sense that it might be recovered back, but confined itself to a consideration of the construction of the Ohio statutes involved, and the constitutionality of the exaction made by the State, in view of the provisions of the Ohio Constitution and of the Constitution of the United States. Upon all these questions the Court sustained the points made for the State, which have been already set forth.

As to the objection made in view of the provisions of Section 5, Article 12 of the Constitution of Ohio, the Court held (*Record*, middle page 33), that the object of the tax, if this exaction be a tax, sufficiently appears from the provision of Section 181*a*, of the Revised Statutes, requiring

the payment of the money into the State Treasury to the credit of the general revenue fund.

As to the objections made in view of the provisions of Section 2 of Article 12, the Court held (*Record*, page 32), that the requirement in this section that all property shall be taxed by a uniform rule according to its true value in money, is simply a limitation on that mode of taxation, and does not exclude taxation upon that which is not property. That the taxing power is embraced in the general grant of legislative power, and is as ample, except where restrained by existing provisions, as the objects and purposes of the State government.

The Court, speaking by Judge MINSHALL, says, bottom page 32:

"Whether the sum required by this statute for filing articles of incorporation be termed a fee, a tax or an assessment, is, we think, immaterial, for it is clear that it is not a tax on property. The filing and record of such articles is simply an authority or license to the persons filing them to form a corporation, and the sum paid therefor is the consideration demanded and paid the State for the grant of the right to be a corporation. We fail to perceive anything in the principles of the government or sound policy, that should forbid the State from making such an exaction, even for the purposes of general revenue. The franchise is valuable to the corporators, or, it is fair to assume, it would not be sought; and that the burdens of government are greatly increased by the formation of corporations, is daily seen in the business of the courts and the police establishment of the State. It is further claimed, that the exaction made by the statute violates that principle of equality that should underlie all taxation. That this principle should not be disre-

garded is clear; but perfect equality is not attainable in any system of taxation. This, however, is equal, in the sense that it applies to the formation of all incorporated companies, and is imposed according to the amount of the capital of each; and in this respect it is neither unequal nor unusual. Cooley Const. Lim., 608."

"The fact that it does not apply to companies already formed does not make it unequal. If that were so, then a change in any fee bill, or rate of charges, would be open to the same objection. The law operates upon the future, and its equality must be determined by the future and not the past."

As to the questions growing out of the Massie law, taken in connection with the statutes of Ohio governing the consolidation of an Ohio railway company with companies of other States, the Court held,

First—That by filing the articles of agreement of consolidation of the companies composing the Wabash System, a new corporation was formed;

Second—That the fee to be paid by an interstate consolidation must be based upon and is measured by the entire amount of capital stock of such consolidated company.

Upon this point the Court says (*Record*, bottom page 34):

"The further claim is made that, by filing the articles of agreement of consolidation of the companies composing the Wabash System, no 'new corporation' is created; and therefor the provisions of section 148*a*, as amended February 12, 1889, do not apply to them; that this section only applies where all the companies entering into the consolidation are Ohio companies. If this were so, then the plaintiffs should not have presented their articles to the Secretary of State to be filed and recorded. But we are of the opinion that it is

not so, and that a new company is formed in the one case as well as in the other. Referring to the Revised Statutes on the subject of 'consolidation,' it will be observed that section 3379 authorizes the consolidation of Ohio companies and that the next authorizes the consolidation of a company in this State with a company in an adjoining State. The next section, 3381, provides how the consolidation is to be effected, and applies without distinction to either case. It is then provided by section 3382, that when the agreement is made and perfected, and the same, or a copy thereof, is filed with the Secretary of State, 'the several companies parties thereto, shall be deemed and taken to be one company, possessing in this State all the rights, privileges and franchises of a railroad company.' And by section 3384 it is provided that, upon the election of the directors of the consolidated company, all and singular the rights, privileges, franchises and property of the company who are parties to the agreement, shall be transferred to and vested in the 'new company without further act or deed.' The result is that by consolidation, whether between Ohio companies or between an Ohio company and companies of another State, a new company is formed by the extinguishment of the old ones. And it has been so determined in a number of cases. *Shields* v. *Ohio*, 95 U. S., 324; *Compton* v. *Railway Co.*, 45 Ohio St. 592, 615; *Lee* v. *Sturges*, 46 id., 163, 169."

I have thus fully stated the points presented in the Ohio courts, and have cited from the decisions delivered there, for two reasons:

First—Because aside from the claims made by the plaintiffs in the Ohio courts, I have no means of knowing what points will be urged by that side in this court, as no brief by counsel for the plaintiffs in error has yet been filed, or will

likely be filed in time for me to make answer in printed form;

Second—Because I desire to insist, that upon the questions concerning the validity of the Massie law as affected by the Constitution of Ohio, and the true construction of that law, in connection with the statutes governing the consolidation of interstate railway companies, both as to the effect of such consolidation in creating a new corporation under Ohio law, and the measure of the fee to be paid for filing such articles of consolidation, the decision of the Supreme Court of Ohio, from which I have cited, must, under the rule of this Court, be accepted as final and conclusive.

The Supreme Court of Ohio has decided, that the Massie law is a valid law under the Constitution of Ohio; that the filing of articles of consolidation of companies forming an interstate railway system, creates a new corporation under Ohio law; and that the fee to be paid for filing such articles of consolidation must be based on the capital stock of the consolidated company created by such filing. These matters having been settled by the Supreme Court of Ohio, the only question of which this Court has jurisdiction is, whether the exaction of this fee, measured by the capital stock of the consolidated company, for filing its articles of consolidation, which is a charge by the State for the privilege of becoming such corporation, with so much capital stock, under Ohio law, was a denial in any sense of the equal protection of the law guaranteed by the Fourteenth Amendment to the Federal Constitution, or was in violation of the clause of that Constitution, granting the power to Congress to regulate commerce among the States.

Respecting the power of a State Court to place a conclusive construction on the laws of the State, so far as affected or controlled by its own Constitution, Mr. Justice NELSON, says, *Railroad Company* vs. *Jackson*, 7 Wallace, 266:

"It has been argued for the plaintiff, that the acts of the Legislature of Pennsylvania, when perfectly interpreted, do not embrace the bonds or coupons in question; but it is not important to examine the subject; for, it is not to be denied, as the Courts of the State have expounded these laws, that they authorize the deduction, and, if no other objection appears against the acts, the defendants would fail."

This is pertinent, in connection with the claim, that by consolidation no new corporation is created, and that a proper construction of Section 148*a* requires the fee to be based on the capital stock of the Ohio constituent company alone.

In the *State Railroad Tax Cases*, 92 U. S., 618, Mr. Justice MILLER says, as to the conclusiveness of a State Court's construction of a State statute as affected by a State Constitution:

"As the whole matter, then, concerns the validity of a State law as affected by the Constitution of the State, that question and the other one of the true construction of the statute, belong to the class of questions in regard to which this Court still holds, with some few exceptions, that the decision of the State Courts are to be accepted as the rule of decision for the Federal Courts."

In *Pembina Mining Company* vs. *Pennsylvania*, 125 U. S., 183, Mr. Justice FIELD says:

"The only questions passed upon by the Supreme Court of Pennsylvania, which can be considered by us, are those which arise upon its ruling against the contention of the plaintiff in error, that the statute of the Commonwealth is

in conflict with the clauses of the Federal Constitution. Its ruling upon the conformity of the statute with the Constitution of the Commonwealth does not come under our jurisdiction."

In *Bucher* vs. *Cheshire Railroad Company*, 125 U. S., 582, Mr. Justice MILLER states the rule in these words:

"It has been held by this Court that the decisions of the highest Court of a State in regard to the validity or meaning of the Constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section. In *Leffingwell* vs. *Warren*, 2 Black, 599, this Court said in regard to the statute of limitation of a State: 'The construction given to a statute of a State by the highest tribunal of the State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text.'"

"In the case of *Luther* vs. *Borden*, 7 Howard, I, 40, Chief Justice TANEY said: 'The point then raised here has already been decided by the Courts of Rhode Island. The question relates altogether to the constitution and laws of that State; and the well settled rule of this Court is, that the Courts of the United States adopt and follow the decision of the State Courts in questions which concern merely the constitution and laws of the State.'"

In the recent case of the *Pullman Car Company* vs. *Pennsylvania*, 141 U. S., 21, a case in which the validity of a Pennsylvania tax was in question, Mr. Justice GRAY says:

"Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania, is a question on which the decision of the highest Court of the State is conclusive. The only question of which this Court has jurisdiction is whether the tax was in violation of the clause of

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the Constitution of the United States granting to Congress the power to regulate commerce among the several States."

Two Broad Grounds for Sustaining the Act.

(a). *Power to regulate corporations.*

(b). *Power to raise revenue.*

"There is no magic in names," said GHOLSTON, J. (*Baker* vs. *Cincinnati*, 11 O. S., 544), in sustaining a license tax; or, as Judge JOHNSON put it (*W. U. Tel. Co.* vs. *Mayer*, 28 O. S., 540), when upholding a tax on the receipts of foreign telegraph and express companies: "If, therefore, under the power of taxation, or the general authority to exclude foreign corporations, or regulate the terms on which they may do business, or under both combined, this law can be sustained, it is our duty so to declare, for unless it manifestly contravenes the Constitution, the judicial department is not warranted in declaring it void." Or, in the language of Judge MINSHALL (*Adler* vs. *Whitbeck*, 44 O. S., 562), sustaining the Dow law taxing the liquor traffic: "It matters not what propriety in the use of terms may require us to designate the power under which this tax has been imposed by the Legislature, if it can reasonably be shown to exist, that should restrain any Court from declaring the statute unconstitutional; nay, more, if it were doubtful, the Court should refrain from so doing."

The same principle of construction obtains in the Supreme Court of the United States. Thus, in the case of the *Western Union Telegraph Company* vs. *Massachusetts*, 125 U. S., 531, a tax imposed by the law of Massachusetts upon the Western Union Telegraph Company was sustained as a tax on the property of the company in Massachusetts, yet

the law designated it as a tax on its corporate franchise. This Court, speaking by Mr. Justice MILLER, says, bottom page 547:

"But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation."

So, whether the contribution exacted under the Massie law be termed a tax on franchises, a fee for official services in creating the corporation, a bonus, a license, or by some other name, matters not, if it can be sustained as a proper exercise of legislative power under the Constitution.

Under the Constitution of Ohio of 1801, corporations might be formed by special acts, which, constituting contracts between the State and the corporations, could not be changed by subsequent legislation without infringing the provisions of the Federal Constitution prohibiting a State from passing any law impairing the obligations of contracts.

Some of these special acts exempted corporations from taxation, others provided for special modes of taxation. As to the tax laws generally, they were inharmonious, unequal and unjust. Many exemptions were made. Much property escaped taxation. To remedy these mischiefs, the present Constitution of Ohio, adopted in 1851, provided that no special act should be passed conferring corporate powers; that corporations might be formed under general laws, but all such laws from time to time be altered or repealed. And to make all property bear a share of the public burden, the passage of laws taxing *all* property, with a few specified exceptions, by a uniform rule, according to its true value in money, was made imperative. As the Supreme Court of Ohio held in this case, following a line of decisions, this section was no grant of the taxing power, but a limitation on the taxation of property.

The act under consideration may be sustained on two grounds:

First. As a proper exercise of the legislative authority under the Constitution, to prescribe the terms and conditions on which corporations may be created, and when created, may do business in this State; in other words, the power to regulate corporations, say when they may be formed, and how they may act when formed.

Second. As a proper exercise of the legislative power under the general grant to raise revenue for the needs of the State in any way not prohibited, expressly or by implication, in the Constitution, this mode being not so prohibited.

I.

POWER TO REGULATE CORPORATIONS.

The granting of corporate franchises resting entirely within the discretion of the general assembly, under the power to regulate corporations a contribution to the State may be exacted, as by the act in question, as a condition of the grant.

Opposing counsel say, there is no relation between the charge made and the benefits received by the persons or corporations who pay under this law; that the filing of articles of incorporations or consolidation, is not for the benefit of incorporators, but an imposition upon them for the protection of the public against the acts of those who usurp the franchises of corporations.

This argument, apparently, is on the theory that the granting of franchises by the State, is a perfunctory act; that persons have some inherent or inalienable right to

make themselves a corporate body, and invest themselves with corporate franchises, irrespective, except in the most formal way, of legislative authority; that, virtually, the State has no power of control or restriction in respect of the creation of corporations, but that, at the mere will and pleasure of private individuals, corporations, infinite in variety and boundless in extent, may be called into existence, clothed with all the peculiar powers of these political entities.

Creation of Corporations; Ohio Law.

Such is not the view taken by the Constitution and the law. The Constitution, Article 1, Section 2, provides: "No special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly;" and, Article 13, Section 2: "Corporations may be formed under general laws, but all such laws may from time to time, be altered or repealed." This leaves the whole control with the legislature. The legislature may repeal all laws under which corporations may be formed, and thus preclude the formation of corporations in this State thereafter; or the legislature may throw such restrictions about the creation of corporations as it sees fit, and may prescribe its own terms and conditions for their formation, and the exercise of their franchises. It is already provided, R. S. Sec. 3235, that corporations cannot be formed to deal in real estate or carry on professional business. The statutes abound with restrictions as to the creation and operation of corporations for special purposes.

The effect of filing articles of incorporation is set forth in Section 3239. Upon such filing, the incorporators shall be deemed a body corporate, with succession, power to sue and be sued, contract and be contracted with, etc.

Similar is the effect of filing articles of agreements of consolidation. Upon the filing of such articles "the several companies parties thereto, shall be deemed and taken to be one company," etc. Section 3382. See also Section 3384*b*, as amended April 11, 1890, (87 O. L. 184.)

The filing of such articles, therefore, does really confer the greatest gift that can be conferred upon a corporation. It breathes into it the breath of legal life. It bestows upon the incorporators something beneficial to them, or why would they ask for it? It gives them the privilege to become a corporation, to act under a common name, as a single person, with powers of succession, without the chance of dissolution or suspension of business, and with a limited individual liability. These are valuable privileges; these are special benefits which they enjoy to the exclusion of the rest of the community, and it is because of them that the burden imposed by the law in question is neither unwise, unfair, nor unjust.

The benefits to individuals from being incorporated, are apparent. The expense and inconvenience to the government in supervising corporations, controlling their operations, and seeing they do not transcend their powers to the prejudice of individual enterprise, is a thing impossible accurately to ascertain, and as to which the legislature, acting for the people, has alone the right to speak.

Article 13 of the present constitution of Ohio provides for the regulation of corporations. Aside from the prohibition of special acts, the matter of the formation and operation of corporations, under general laws, is left wholly to the discretion of the legislature. By general laws, the general assembly may prohibit in future the formation of corporations, may prohibit their consolidation, may prohibit the

increase of capital stock; or, instead of prohibiting, may annex such terms and conditions as it sees fit to the creation, the consolidation, the increase of stock of corporations. The legislature may exact such contribution as it pleases, from those desiring to become incorporated, as a condition precedent to their corporation. It may exact such contribution as it pleases from companies wishing to consolidate as a condition of their consolidation. And it may further annex such conditions to the enjoyment of the grant in the way of a continued contribution to the State, as it may deem wise. It may require a fixed sum or charge to be paid to the State at the time of incorporation or consolidation, as the Massie law does. Or it may go further, as in other States, and require as a condition of the exercise of the franchise, that there be paid the State a specific sum each year, or a specific portion of the gross receipts of the corporation, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe.

Under the old Constitution, special conditions of this sort might have been annexed to particular grants by special laws, but, of course, under our present Constitution the same conditions must apply to all corporations, since they can only be annexed to grants by general laws. The act in question is, of course, a general law, affecting all incorporations or consolidations made after its passage.

Persons who desire to become incorporated, or corporations that desire to become consolidated, or corporations that desire to increase their capital stock, thus extending their corporate existence, are in no condition to complain because of the contribution required from them. They come to the State, the State does not go to them. They come to the State asking a favor. They come requesting a benefit, or

else they would not come. They do not have to come. They can go on doing business as before, either, as private persons or as corporations with the powers already possessed. But when they do come and ask for further privileges, which they can get only from the State, they must pay for the privileges whatever the State sees fit to demand. The State makes the price, and to get the privilege they must pay the price. Or, as a New York Court put it (37 N. Y., 365), "If the grantee accepts the boon it must bear the burden."

What a Franchise Is.

In *California* vs. *Pacific Railway Company*, 127 U. S., 40, Mr. Justice Bradley, speaking for the Court, defined a corporate franchise thus:

"A franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration." . . . . "Under our system, their existence and disposal are under control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority." . . . . "No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

As to the power on the part of the State which grants it, to tax a franchise, he says, bottom of page 41:

"The taxation of a corporate franchise merely as such,

unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid.

Applying these principles to the case at bar, the right on the part of several railroad companies to consolidate and act as one corporation under Ohio law, is a "privilege or power of public concern," which ought not to be exercised, and cannot be exercised, by such companies at their mere will and pleasure, but is reserved for the control of the State. This power is a franchise. And this franchise, the grant of which rests with the discretion of the State, may be taxed as the legislature of the State may choose.

In *Home Insurance Company* vs. *New York*, 134 U. S., 599, Mr. Justice FIELD says: "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporation or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely within the discretion of the State, and of course, when granted, may be accompanied by such conditions as the legislature may judge most befitting to its interest and policy. It may require as a condition of the grant of the franchise and also of its continued exercise, that the corporation pay a specific sum to the State each

year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe."

The New York Court of Appeals, in *Monroe Savings Bank* vs. *Rochester*, 37 N. Y., 365, is quoted to this effect: "It must be regarded as a sound doctrine to hold that the State in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the State. If the grantee accepts the boon, it must bear the burden."

Bonus or Price for Incorporating.

The power of a State to put a price on corporate privileges, and to exact a bonus for the grant of a franchise, has been distinctly upheld in this Court in the cases of *Gordon* vs. *Appeal Tax Court*, 3 Howard, 133, and *The Baltimore and Ohio Railroad Company* vs. *Maryland*, 21 Wallace, 456.

In the first of these cases, *Gordon* vs. *Appeal Tax Court*, 3 Howard, 133, in which the State of Maryland granted a franchise to a bank, for a stipulated price, being the annual payment of twenty cents on every $100.00 of the paid-in capital stock, with the agreement that no tax should be imposed upon the charter or franchise, the Court, speaking by Mr. Justice WAYNE, says, bottom page 145:

"A round sum, or an annual charge, with or without reference to capital stock, may be asked by a legislature for such a franchise. It may be more convenient to the banks to have such a consideration or bonus distributed through the years of their corporate existence, than to pay its equivalent in advance. This option was given to the old banks. Being so given, it is conclusive that the legislature intended

the annual tax or charge upon the capital stocks of the banks to be the bonus or price, or part of the price as to some of them, that they were to pay for the prolongation of their franchise of banking."

In the Baltimore and Ohio Railroad Company vs. *Maryland*, 21 Wallace, 456, the State of Maryland granted The Baltimore and Ohio Railroad Company the right to build a branch from Baltimore to Washington, annexing, however, to the franchise, the condition that the company should pay semi-annually to the State one-fifth of the amount received for the transportation of passengers. Suit was brought by the State of Maryland for $500,000.00, being one-fifth of the passenger earnings from 1860 to 1870, and judgment was recovered in the State court which was affirmed by the Supreme Court of the United States. The objection was urged that the statute exacting one-fifth of the passenger earnings, levied a tax upon the subject of interstate commerce or the receipts from interstate commerce.

Mr. Justice BRADLEY delivered the opinion.

After discussing (pages 470, 471) the different modes, by water and land, of carrying on commerce between the States, the proposition is made that, had the State built the road in question, it might charge whatever it saw fit to exact for transportation over it, and the Court says, page 472:

"As before said, the State could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ in a constitutional point of view, when it authorized its private citizens to build the road and reserved for its own use a portion of the earnings. We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the State, as a

condition of the franchise, had stipulated that it should have all the passenger money, and that the corporation should have only the freight for transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the State of absolute control over its own property and prerogatives."

Again, on page 473, answering the objection that the exaction of this amount operates as a burden upon interstate commerce:

"It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuiiu*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more or less than a bonus."

The foregoing is a complete answer to the claim of the other side that the exaction of the fee in controversy imposes a burden on interstate commerce.

Control by State of Foreign Corporations.

In much the same position as persons desiring to incorporate, or companies wishing to consolidate, stands a foreign corporation, which asks to do business in a State other than

that in which it was created. There is a lack of authority to do business in the form and manner desired. And to get such authority the State must grant a privilege, for which, the cases are uniform in holding, the State may exact such contribution as it sees fit.

One of the early cases on the subject of the control of a State over foreign corporations is *Bank of Augusta* vs. *Earl*, 13 Peters, 519, argued by DANIEL WEBSTER and decided by Chief Justice TANEY, speaking for the Court, who says, page 588:

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

In *Lafayette Insurance Co.* vs. *French*, 18 Howard, 404, 407, an insurance company was incorporated under the laws of Indiana, and in compliance with the requirement of the law of Ohio appointed a resident agent, upon whom service might be made in Ohio. An Ohio citizen insured by this company, recovered a judgment, by suit in Ohio, after service made on the resident agent of the company in Ohio. The Court held this judgment to be good; that the company could do business in Ohio only by the assent of Ohio, to which assent such condition might be annexed as the State saw fit.

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. 13 Peters, 519. This consent may be accompanied by such conditions as Ohio may think fit to impose." (Decision, p. 407.)

The leading case on this branch of law is *Paul* vs. *Virginia*, 8 Wallace, 168, 181.

A Virginia law required all foreign insurance companies, to deposit bonds with the Treasurer of State, before being permitted to do business in the State. Paul, as agent, did business in Virginia for a New York company, which had not complied with the statute and deposited the bonds. For this he was arrested and convicted, and the Supreme Court of the United States sustained the conviction and the Virginia insurance law upon which it was based.

Mr. Justice FIELD delivered the opinion. He says, speaking for the Court, page 181:

"Now a grant of a corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this Court, in *Bank of Augusta* v. *Earl*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of these States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign

corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

The following is especially pertinent:

"At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States."

Following the case of *Paul* vs. *Virginia* came the case of *Ducat* vs. *Chicago*, 10 Wallace, 410, 415, in which the insurance company was not only required to comply with the general laws of Illinois, as a condition of doing business in that State, but also to pay a share of its premiums to the City of Chicago, for the privilege of doing business in that city, the Court saying, page 415:

"The only difference between the statute of Virginia and that of Illinois is, that the latter is more onerous to the companies than the former. The difference is in degree, not in principle."

In *Doyle* vs. *Continental Insurance Company*, 94 U. S., 535, the revocation of a license of a foreign insurance com-

pany by the Secretary of Wisconsin, in pursuance of a law of that State, because it transferred a suit against it from the State to the Federal Courts, was sustained as a proper exercise of the power of the State to impose such conditions as a State sees fit on foreign corporations transacting business in the State. The Court so held, notwithstanding that in the case of *Insurance Company* vs. *Morse*, 20 Wallace, 445, it was adjudged that the agreement which the company was compelled to make, not to remove a suit into the Federal courts, was absolutely void.

Upon the point that the reasons actuating a state in imposing conditions upon foreign corporations, or revoking the license of a foreign corporation to do business in the State, cannot be inquired into, Mr. Justice HUNT, speaking for the Court, says, page 541:

"If the act of an individual is within the terms of the law, whatever may be the reasons governing him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world."

Again, page 542:

"It is said that we thus indirectly sanction what we condemn when presented directly; to-wit, that we enable the State of Wisconsin to enforce an agreement to abstain from the Federal Courts. This is an unexact statement. The effect of our decision in this respect is that the State may compel a foreign company to abstain from the Federal Courts or to cease to do business in the State. It gives the company

the option. This is justifiable, because the company has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there."

So the constituent companies of the Wabash system had, and have, no constitutional right to consolidate in Ohio; Ohio has authority at any time to declare that railroad companies shall not be consolidated; Ohio has the right at any time to say that persons shall not be incorporated.

In *Philadelphia Fire Association* vs. *New York*, 119 U. S., 110, the validity of the tax levied by the State of New York on a Pennsylvania insurance company as a license fee for the privilege of doing business in New York, was sustained on the authority of *Paul* vs. *Virginia* and the prior and succeeding cases of a similar nature.

Mr. Justice BLATCHFORD delivered the opinion of the Court. He says, middle page 119:

"This Pennsylvania corporation came into the State of New York to do business by the consent of the State, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within ts jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

In this case, as in *Paul* vs. *Virginia*, the Court makes the

reservation that the power of a State to exclude a foreign corporation from doing business within its limits is not to be extended to an interference with a transaction of commerce; but the consolidation of companies is not a transaction of commerce.

In *The Pembina Mining Company* vs. *Pennsylvania*, 125 U. S., 181, 186, the Court sustained a tax of one-half of a mill on each dollar of its capital stock, levied under a Pennsylvania law, on a Colorado mining company, for the privilege of keeping an office in Philadelphia for the use of its officers, stockholders, agents and employes.

After stating the principle laid down in *Paul* vs. *Virginia*, and the qualifications growing out of the inter-state commerce clause of the Constitution, Mr. Justice FIELD, speaking for the Court, says, page 186:

"The Colorado corporation does not come within any of the exceptions. Therefore the recognition of its existence in Pennsylvania was a matter dependent on the will of the State. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State." (Citing several cases.)

"We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its offi-

cers, stockholders, agents and employes; nothing more and nothing less; and in what way this can be considered as a regulation of interstate commerce is not apparent."

So as to the fee exacted under the Massie law. There is no tax levied upon the franchise of the foreign constituent companies, nor upon their business or property without the State. The fee is exacted only as a condition of their consolidation within Ohio, and by Ohio law; "nothing more and nothing less; and in what way this can be considered a regulation of interstate commerce is not apparent."

A Few State Cases in Point.

In *Fire Department of Milwaukee* vs. *Helfenstein*, 16 Wisc. 136, a Wisconsin law providing that no insurance agent should do business in Milwaukee until he had given a bond to pay annually a certain per cent. of premiums received, was held not to infringe a constitutional provision declaring that "the rules of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature may prescribe."

The Court says, p. 139: "The percentage of the premiums directed to be paid, is in no just sense a tax upon the agent, or on his occupation or business. * * * Whether these foreign insurance companies shall do business in this State, is a matter which concerns the State. They may be permitted or prohibited; and if permitted, the sovereign power may impose such conditions and restrictions as it sees fit."

In *Leavenworth* vs. *Booth*, 16 Kans., 627, an ordinance imposing a license fee on insurance companies was held not to violate the constitutional provision of Kansas, that "the

Legislature shall provide for a uniform and equal rate of assessment and taxation;" nor that providing "that no tax shall be levied except in pursuance of law which shall distinctly state the object of the same." The Court, p. 635, quotes many authorities in support of the position, that a license tax was not a tax in the meaning of the Constitution, even where the surplus of the license goes to swell the revenue fund. The Court adds:

"The imposition of a license tax is in the nature of a sale of a benefit or a privilege to a party who would not otherwise be entitled to the same. The imposition of an ordinary tax, is in the nature of a requisition of a contribution from that which the party taxed already rightfully possesses in the State. The insurance company involved in this controversy, is a foreign insurance company having no rights in this State except such as the State may see fit to confer upon it."

In *W. U. Tel. Co.* vs. *Mayer*, 28 O. S., 523, the authority of the State to regulate corporations, both domestic and foreign, and prescribe the terms upon which they may exercise their franchises within this State, were fully discussed by Judge JOHNSON. The question before the Court being whether a tax or assessment on the gross receipts of the Western Union Telegraph Company was a valid enactment, only permitted a decision on the point of the authority of the legislature to charge a foreign corporation what it saw fit for the privilege of doing business in this State; but the reasoning of the Court applies to domestic as well as foreign corporations. On page 539, the Court says:

"To this branch of legislative authority belongs the power to create corporations and to prescribe the terms and conditions upon which they may exercise their franchises."

This is a clear declaration in favor of the power, the existence of which is in question in the case at bar.

Judge JOHNSON proceeds: "The power over foreign corporations is equally clear. They may be excluded from the State altogether or admitted on such terms as the State may prescribe." The same is true of domestic corporations; they may be prohibited altogether or created on such terms as the State may prescribe.

In *State ex rel. New England Life Insurance Company* vs. *Reinmund*, 45 O. S. bottom page 218, the Supreme Court of Ohio, speaking by Judge SPEAR, held the tax collected by the Superintendent of Insurance of Ohio on the gross receipts of foreign insurance companies doing business in Ohio, "to be a tax not upon property, but upon the franchise, the right to do business, being as to foreign corporations, thus permitted to exercise the franchise by comity, a condition which the State sees fit to prescribe attached to the privilege granted."

Sale of Franchises by Cities.

In connection with the validity of the charge collected by the Massie law for the privilege of corporate existence in Ohio, I beg to call the Court's attention to the fact, that in Cincinnati and other Ohio cities—and I dare say the same thing is true all over the country—the municipality, acting as an agency of the State, has required street railway companies, as a condition of enjoying their franchises within the city, to pay a per cent. of their annual gross receipts into the city treasury for the support of the city government The validity of this charge has never been contested. It is not regarded as a tax levied, but as a price paid or agreed to be paid, for the privilege granted by the city at the request of the street railway company.

Now, if the municipality, a fractional part of the State, has the unquestioned right to exact the contribution spoken of as a condition attached to the exercise of certain corporate rights within the territory controlled by it, why has not the State, the supreme authority, the right to exact the contribution enforced by the act under consideration from those asking for privileges and franchises which the State alone can confer, as one of the conditions upon which alone they may be enjoyed?

II.

POWER TO RAISE REVENUE.

The raising of revenue being a recognized purpose of government, the legislature, under the general grant, may exact this contribution, which is not imposed on property, but charged for franchises, and is equal and uniform, exacted from all obtaining corporate privileges, and in proportion to the measure of the privileges obtained.

Extent of Taxing Power.

The extent of the power of taxation possessed by a State, is well described by Mr. Justice FIELD, speaking for the Court, in the *State Tax on Foreign Held Bonds*, 15 Wallace 300.

He says, page 319: "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts,

excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

In *The Union Pacific Railroad Company* vs. *Peniston*, 18 Wallace, 5, wherein a tax levied by the State of Nebraska upon the property of the Union Pacific Railroad Company was sustained, although the company was operated under a franchise granted by the United States, the Court, speaking through Mr. Justice STRONG, said:

Page 29—"That the taxing power of a State is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal government, either expressly or by necessary implication, are propositions that have often been asserted by this Court."

Top page 30—"The extent to which it (the taxing power of a State) shall be exercised, and the mode in which

it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National government."

The fees are for official services in granting a franchise, not in merely filing a paper:

The law says: "The Secretary of State shall hereafter charge and collect the following fees for official services." Counsel urged below that the charges fixed by the law will not stand the test as fees for official services, because they are grossly in excess of a reasonable compensation for the services performed. This objection was on the theory already referred to, that the granting of a franchise by the State is a perfunctory act, and that the official services of the Secretary of State are purely clerical; that all the State has a right to charge for is the physical act on his part or the part of the clerks; that such are the only official services rendered for which compensation can be required.

But is not this a narrow view to take of the official services rendered by the Secretary of State in such cases? In filing articles of incorporation or consolidation, the Secretary of State acts for and on behalf of the State, not on behalf of the individuals desiring to incorporate, or the companies desiring to consolidate. The official service he performs as the agent of the State is to create a corporation. This is the immediate result of the filing of the articles. The official services rendered by the Secretary of State under this act is but another description for the granting of

franchises by the State. It is for official services in granting a franchise, in conferring a privilege which the State alone can confer, that the general assembly, by this act, representing the State and the people, has seen fit to make the charge imposed. For such services the charge is not excessive. It is moderate. Many States, for the same services in conferring the privilege of corporate existence, require an annual payment to be made during the life of the corporation.

The problem of so framing the laws as to compel corporations to bear their fair share of the increased burdens of the State is a difficult one. The property rule of taxation has not reached the valuable rights, privileges and franchises through the enjoyment and exercise of which corporations have grown immensely rich. The effective mode of raising revenue from corporations is to base the charge on the privilege or franchise in one way or another,—to annex as a condition to the privilege of corporate existence the payment of a contribution to the State. In this way Massachusetts collects over three million, Michigan nearly a million, New York about a million and half, Pennsylvania two and one-half millions, and Wisconsin about half a million, annually, from corporations.

Power to Tax Franchises.

The distinction between a contribution exacted by the State as a condition of corporate existence, and a tax on property, has been clearly drawn in many decisions of this Court. The character of the investments of the corporation will not be permitted to affect the tax on its corporate franchise.

Thus, in *Society for Savings* vs. *Coite*, 6 Wallace, 594, a law of Connecticut requiring savings banks, having no capital stock, to pay the State annually a sum equal to three-fourths of one per cent. on the total amount of their deposits on the first of July in each year, was sustained as a tax on a franchise, and not a tax on property. The tax being on the franchise of the corporation, it mattered not if the assets were invested in part in United States bonds.

Said the Court, speaking by Mr. Justice CLIFFORD, page 606:

"The power to tax resides in government as a part of itself and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies."

"Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State government."

As to the propriety of taxing such corporations, it is said, page 608: "They enjoy important privileges, and it is just that they should contribute to the public burdens."

In *Provident Institution* vs. *Massachusetts*, 6 Wallace, 611, a tax similar to the tax in the last named case, levied by Massachusetts on the franchises enjoyed by savings banks, was sustained on similar grounds. Drawing the line between taxes upon franchises and taxes upon property, the Court said, bottom page 631:

"Franchise taxes are levied directly by an act of the Legislature, and the corporations are required to pay the amount into the State Treasury. They differ from property taxes, as levied for State and municipal purposes, in the basis

prescribed for computing the amount, in the manner of assessment, and in the mode of collection. * * * Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter."

Again, in *Hamilton and Company* vs. *Massachusetts*, 6 Wallace, 632, a tax levied under a Massachusetts statute, requiring corporations having a capital stock divided into shares, to pay a tax of one-sixth of one per cent. upon "the excess of the market value" of its stock over the value of its real estate and machinery, was sustained as a franchise tax.

In the *State Tax on Gross Receipts*, 15 Wallace, 284, the validity of the tax levied was sustained on two grounds, one of which was that the corporation which was the subject of the taxation was a Pennsylvania corporation exercising a franchise conferred by that State. Upon this franchise the State had a right to levy a tax.

Said the Court, page 293: "In exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises, or the value of them, but may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise."

In the *Delaware Railroad Tax Case*, 18 Wallace, 206, a tax of one-fourth of one per cent. upon the capital stock, the proportion of the same taxable in Pennsylvania having been ascertained on the mileage basis, was sustained as a franchise tax on the corporation.

Said the Court, speaking by Mr. Justice FIELD, page 231: "The tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation, but is a tax upon the corporation itself."

As to the power of the State to fix the tax, the Court said, same page: "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

In the *State Railroad Tax Cases*, 92 U. S., 575, the Illinois acts taxing the franchises of railroads were held valid. The Constitution of Illinois provides that the general assembly shall raise revenue by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his property. (This is substantially the provision of Section 2, Article 12, of our constitution.) In addition, power is given to tax peddlers, auctioneers, and various special pursuits, including persons or corporations owning or using franchises or privileges. (This power is included under the general grant in the Ohio Constitution.)

The law passed on provided, in addition to a tax on the value of the real estate, including track, depots, buildings, etc., and of the rolling stock and personal property, for a further tax on the franchise and capital stock of the corporation.

The Court, by Justice MILLER, says, page 603: "That the franchise, capital stock, business and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day. Nothing can be more certain in legal decisions, says this Court, in *Society of Savings* vs. *Coite*, 6 Wall. 607, than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by the State for the support of the State government."

In *Home Insurance Company* vs. *New York*, 134 U. S., 594, a tax imposed by the State of New York upon the corporate franchise or business of all corporations, whether foreign or domestic, doing business within the State, to be measured by the extent of the dividends of the current year, was held to be a tax upon the privilege of being a corporation, and doing business within the State in a corporate capacity, and not a tax upon the privilege or franchise, which, when incorporated, the company may exercise. Therefore, its imposition upon dividends did not violate the law exempting U. S. bonds from taxation, although a portion of the dividends were derived from interest on capital invested in said bonds.

It was held further, that the validity of a State tax upon corporations created under its laws or doing business within its territory, can in no way be dependent on the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise.

Defining the particular franchise taxed, the Court, speaking by Mr. Justice FIELD, says, bottom page 599: "By the term, 'corporate franchise or business,' as here used, we understand is meant the right or privilege given by the

State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise."

The further language of the Court as to the value of such a franchise, and the power of the State to annex conditions to its enjoyment and thus obtain revenue, has already been quoted, *supra*, page ——.

This case of the Home Insurance Company was twice argued, and thoroughly considered, most of the cases I have cited being referred to and discussed.

The concluding case under this head of the argument, is *Maine* vs. *The Grand Trunk Railway Company*, 142 U. S., 217, wherein an excise tax, levied upon a railroad lying partly within and partly without the State of Maine, for the privilege of exercising its franchises within that State, the tax being ascertained by taking a portion of its gross receipts, ascertained on the mileage basis, was sustained.

Mr. Justice FIELD delivered the opinion, saying for the Court, page 227: "The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. * * * That a tax of this character is within the power of the State to levy there can be no question. * * * The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that a corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such

conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specified period, or the times of its payment. The whole field of inquiry into the extent of the revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege."

Overruling the objection that the tax was imposed upon receipts from interstate commerce he says: "A resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. * * * There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

The case of *The Home Insurance Company* vs. *New York*, 134 U. S., 594, is cited and followed, and the case of *The Philadelphia and Southern Steamship Company* vs. *Pennsylvania*, 122 U. S., 326, distinguished.

III.

EFFECT OF CONSOLIDATION IN OHIO.

The effect of filing articles of consolidation of a railway company of Ohio with railway companies of other States, is to create a new corporation, and to confer upon the new consolidated company additional and valuable privileges in Ohio. For the franchises thus granted and privileges conferred, the charge under the Massie law is made.

While the State of Ohio claims that the holding of its Supreme Court in its favor on the above proposition is conclusive and binding on this Court, nevertheless it may not be inappropriate to refer to some of the grounds on which the holding is based. Much of the argument in the Supreme Court of Ohio centered about this proposition; and that is not surprising, for if the filing of the articles of consolidation of the Wabash System formed a new corporation, with a capital stock of fifty-two millions of dollars, and with additional and valuable privileges under Ohio law, it will be hard for the plaintiffs to satisfy this Court that the State of Ohio did not have a perfect right to charge for the franchises granted to the new corporation a fee based on the capital stock of that corporation.

The result of filing articles of consolidation in Ohio, must be determined by the terms of the articles filed, taken in connection with the provisions of Ohio law. Whether the constituent companies be Ohio corporations, or partly Ohio and partly foreign corporations, the consolidation is an Ohio consolidation, made under Ohio law, and possessing the rights and privileges conferred by Ohio statutes.

Reference has already been made to the terms of the agreement of consolidation in this case. In these articles it is provided, that, upon their filing, "the said corporations parties hereto (meaning the constituent companies), SHALL BE DEEMED AND TAKEN TO BE ONE CORPORATION UNDER THE NAME AND STYLE OF THE WABASH RAILROAD COMPANY." And it further is provided, that upon the selection of the directors of the consolidated company, all the property and franchises of the constituent companies shall be vested in the new corporation, "AND THE FIVE NAMED CORPORATIONS (meaning the constituent companies) SHALL FOREVER CEASE AND DETERMINE." Supra., page —; Record pages, 19, 20. What these articles provide—the creation of the new corporation and the wiping out of the old, is carried into effect by the Ohio statutes on this subject.

The provisions for the consolidation of railway companies, are found in Revised Statutes of Ohio, Sections 3379 *et seq.* Section 3380 provides for the consolidation of domestic with foreign railway corporations. Section 3381 describes the agreement and proceedings that must be made and taken.

Section 3382 sets forth the effect of the filing of the agreement to consolidate, as follows: "When the agreement is made and perfected, as provided in the preceding section, and the same or a copy thereof filed with the Secretary of State, the several companies parties thereto shall be deemed and taken to be one company, possessing within this State all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of a railroad company."

Section 3383 provides for the election of directors of the consolidated company. Section 3384 says that, upon the

election of directors of the consolidated company, all the rights, privileges, franchises and property of each of the companies shall be deemed to be transferred to and vested in the new company.

The section reads as follows:

Section 3384: "Upon the election of the first board of directors of the company created by agreement of consolidation, all and singular the rights, privileges and franchises of each of the companies to the agreement, and all the property, real, personal and mixed, and debts due on account of subscriptions of stock, or other things in action, shall be deemed to be transferred to and vested in such new company, without further act or deed; all property, rights of way, and other interests, shall be as effectually the property of the new company as they were of the companies parties to the agreement; the title to real estate, either by deed, gift, grant, or by appropriations under the laws of this state, shall not be deemed to revert or be impaired by reason of the consolidation; but all such rights of creditors, and all liens upon the property of either of such companies, shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities, and duties of either of said companies, shall thenceforth attach to the new company, and be enforced against it to the same extent as if such debts, liabilities, and duties had been contracted by it."

The act of April 11, 1890, (87 O. L. 181.) confers additional and important powers upon consolidated companies with respect to the borrowing of money, the issuing of bonds and the issuing of its own stock. These provisions are too numerous to be quoted at length. Supplementary sections 3384*a* and 3384*b* (p. 183.) confer upon a consolidated com-

pany, such as the Wabash, valuable privileges not possessed by the constituent companies.

For instance, while, by section 3248, a majority of the directors of the constituent company must be citizens of Ohio, section 3385, as amended by the act of April 11, 1890, provides that only two of the directors of the consolidated railroad company need be residents of Ohio. The constituent company was required to have its principal office in Ohio, but this section 3385 permits the consolidated company to have its principal office in another State. Under section 3300, the constituent company may lease another railroad, only in case the lines of road of the two companies are continuous or connected and not competing; but by section 3384*a* (87 O. L., 183), the consolidated company may lease a railroad if it is connected with the line of road of the consolidated company, there being no restriction that the line must not be competing. There are numerous other differences between the power which the Ohio constituent company had and that which the consolidated company now has under Ohio statutes.

By section 3388, a stockholder who refused to convert his stock into the stock of the consolidated company is assured the payment of the actual value of his stock. If this actual value cannot be reached by agreement between the stockholder and the directors, a method of arbitration and appeal to the Courts is provided for ascertaining such value. This is in accordance with the policy in Ohio, providing for the extinguishment of the constituent company.

The result of filing the articles of consolidation, is to create a new corporation, with certain new powers within this State, which result is distinctly set forth in the statutes quoted, and despite the citations made by counsel to

the contrary, the decisions of the Supreme Court of Ohio, and of this Court, are uniform in holding, that the consequence of consolidation is just what our statutes plainly provide, namely, the creation of a new corporation.

Lee vs. *Sturges*, 46 O. S., 153, was quoted below in support of the claim, that no new corporation is created by a consolidation. The case holds precisely the reverse. The holding of the Court is, that the stockholder in the consolidated company—the company involved in the case was the Lake Shore and Michigan Southern Railway Company, an interstate consolidation on all fours with the Wabash,—must pay taxes upon his stock, because it is the stock of a company, the consolidated company, that does not list all of its property in Ohio, but only a part of its property. If he were considered as still a stockholder in the Ohio corporation, if the constituent companies had not become merged in the consolidation, then his stock would not be taxable.

The Court, by Judge SPEAR, used the following language: "The consolidated company, when the agreement of consolidation is made and perfected, and the original or a copy filed with the Secretary of State, is to possess within this State all the rights, privileges and franchises, and be subject to all the restrictions, liabilities and duties of a railroad company." (Bottom p. 168.)

"Again, by the act of consolidation, the shares of stock in the consolidating companies held by the stockholders, are surrendered, and in their place are substituted shares in the consolidated company. That which before was in a sense represented in the railroad and other property in Ohio, is now in the same sense represented in the entire railroad and property of the consolidated company. The old Ohio company is without any certificates of stock whatever. Indeed,

it has ceased to exist, for, on perfecting the agreement, the several corporations shall be taken and deemed to be one corporation. That one is the *new* one. The old is abolished and its charter extinguished. The new one thus created stands in all respects, in view of the law, as if the old companies had never existed. (SWAYNE, J., in *Shields* vs. *Ohio*, 95 U. S. 324.) The present company, if treated as an Ohio company, has out no stock, and it is, therefore, not the stock of an Ohio company which is sought to be taxed. The Ohio stockholder has no more interest in or control over the property in this State, than in that lying in the other States, nor have the stockholders residing in the other States any less interest in the Ohio corporation, than that lying without. Upon a dissolution of the corporation, all stockholders of the consolidated company, wherever residing and by whatever company of the consolidation their original stock was issued, would be interested alike in the whole residuum in proportion to their respective shares."

It was argued below that the stockholders of a consolidated company like the Wabash are not subject to assessment on their individual liability under the constitution and law of Ohio; and, therefore, to hold the consolidated company a new corporation would result in the anomally of a corporation with a capital stock without the individual liability imposed by Ohio law. Upon this point, the Supreme Court of Ohio held that "Whatever may be the holding in other States, there can be no doubt but that in Ohio the stockholders of an incorporated company, however formed, are individually liable for its debts to the extent fixed by the statute." *Record*, bottom page 35. But if the contention were good, then the wiping out of the stock of the Ohio constituent company, which was assessable, and the issuing

of the stock of a consolidated company, which, according to the other side, is non-assessable, was a special and very valuable privilege conferred by the consolidation.

In *Compton* vs. *Railway Company*, 45 O. S., 592, the result of the consolidation of this very Wabash system, as The Wabash, St. Louis and Pacific Railway Company, was before the Supreme Court of Ohio. The Court, speaking by Judge MINSHALL, said, page 615:

"Nor can there be much question but that by the consolidation the prior companies are extinguished for all purposes except to preserve the rights of their creditors, for which purpose they 'may,' in the language of the law, 'be deemed to be in existence.' The observation of Mr. Justice SWAYNE, in construing this statute in *Shields* vs. *Ohio*, 95 U. S., 319, that 'it was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution,' is quite accurate."

Again, bottom page 615: "Each constituent company not only parts with its property, but ceases to be a juristical entity, capable of owning or acquiring property. It does not and could not receive any consideration for the transfer, because it is extinguished and dissolved by the act of its stockholders in assenting to the proposed agreement."

In *Shields* vs. *Ohio*, 95 U. S., 319, a case in which was involved the effect of the consolidation under Ohio law of the interstate system known as The Lake Shore and Michigan Southern Railway, this Court held that the consolidation, pursuant to the Ohio law, of railway companies of Ohio with railway companies of other States, worked the dissolution of the constituent companies. All the powers and franchises of the new consolidated company thereby formed

are derived from the statute under which the consolidation takes place, and are subject to be "altered, revoked or repealed by the general assembly," under Section two, Article one, of the Constitution of Ohio.

Mr. Justice SWAYNE, speaking for the Court, says, bottom page 322, 323: "The legislature had provided for the consolidation. In each case, before it took place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All—the old and the new—could not coexist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence."

Again, bottom page 323: "When the consolidation was completed, the old corporations were destroyed, and a new one was created, and its powers were 'granted' to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect there is no ground for any distinction."

"These views are sustained by several well considered cases exactly in point. One of them elicited the unanimous judgment of this Court. *Clearwater* vs. *Meredith*, 1 Wallace 25; *McMahon* vs. *Morrison*, 16 Indiana, 172; *State of Ohio* vs. *Sherman*, 22 O. S., 411; *Shields* vs. *State of Ohio*, 26 O. S., 86."

Page 324: "The constitutional provision, that no special privileges or immunities shall ever be granted that may not be revoked or repealed by the general assembly, entered into the act under which the consolidations were made, and rendered the corporation created and the franchises conferred, subject to the repeal and alteration just as if they had been expressly declared to be so by the act."

In this case of *Shields* vs. *Ohio*, it was contended on the part of the consolidated railway company, that it might charge a rate of fare for passengers in excess of the maximum permitted by the Ohio statute passed since the adoption of the present Constitution, because one of the Ohio constituent companies was created prior to the adoption of the present Constitution, under a special charter, which constituted a contract between the State and itself, and authorized it to charge a rate of fare in excess of what was permitted by law in Ohio at the time the consolidated company was created in Ohio. But as is indicated in the preceding paragraph, this Court held, that the completion of the consolidation under Ohio law wiped out of existence the old corporations, with their special privileges, and created a new corporation. All the franchises of the consolidated company having been granted to it at the time of its creation, the privileges thus conferred became subject to repeal and alteration by the general assembly under the provisions of the present Constitution.

Now it is for the privileges and franchises conferred upon the new corporation by consolidation under the Ohio law, according to the decision of this Court in the case just cited, that the charge under the Massie law is made. That fee can not be based upon the $700,000. of capital stock of The Toledo and Western Railway Company, the Ohio con-

stituent company, because no privileges whatever were by the consolidation granted to that corporation. Instead of any franchises being granted, the franchises that corporation already had were taken away from it, and the corporation was, by the consolidation, wiped out of existence.

In *Wabash, St. Louis & Pacific R'y Co.* vs. *Ham*, 114 U. S., 587, the effect of a prior consolidation of this very "Wabash System," under Ohio law, came before this Court.

Mr. Justice GRAY delivered the opinion of the Court. He says, page 595:

"Whether the old corporations are dissolved into new corporations, or are continued in existence under a new name and with new powers, and whether, in either case, the consolidated company takes the property of each of the old corporations charged with a lien for the payment of the debts of that corporation, depend upon the terms of the agreement of consolidation, and of the statutes under whose authority that consolidation is effected."

"The effect of the Ohio Consolidation Act was to merge the old corporations into the new one, which took their place, succeeded to their property and assumed their liabilities.

Shields vs. *Ohio*, 95 U. S., 319.

Railway Co. vs. *Georgia*, 98 U. S., 359."

In *Railroad Co.* vs. *Georgia*, 98 U. S., 359, 362, it was held that the consolidation of two railroad companies, under certain acts passed by the legislature of Georgia, created a new corporation.

The decision in *Nashua* vs. *The Lowell Railroad*, 136 U. S., 356, almost exclusively relied on by the other side, turns upon the wording of the agreement of consolidation and of the terms of the statutes of New Hampshire and Massachusetts. It is not a decision of general application, or one that

in any way affects or overrules or qualifies the holdings of the Supreme Court of Ohio and of this Court in the cases cited as to the effect of the filing of articles of consolidation under *the Ohio statutes.*

Whatever the effect in detail of consolidations, and whatever the decisions upon collateral questions growing out of interstate consolidations, the fact remains clear that, under the Ohio statutes, as construed by the highest courts, additional and valuable privileges and franchises are conferred by a consolidation, and take effect upon the filing of the articles of consolidation. It is for these privileges, which the State has a right to grant or withhold, or to alter or revoke, that the State makes the charge fixed by the Massie Law. As in the case of an incorporation, it matters not whether all of the persons incorporating live in this State or some outside of the State, so in the case of a consolidation, it matters not whether all of the constituent companies were created by this State, or some by other States; in either case, they, through their proper agencies, come to the State and ask a favor, the privilege of becoming incorporated, or becoming consolidated, under the statutes of Ohio, a favor they can get only from Ohio, and for which Ohio can exact whatever contribution to her revenue she sees fit to exact.

Opposing counsel went to the trouble below of securing a copy of a recent decision of the Court of Appeals of New York, in the case of the *People* vs. *The N. Y., C. & St. L. R. R. Co.*, now reported in 129 N. Y., 474, which he said he regarded as conclusive of the question involved in the case at bar. So far as one case could be conclusive, this case was conclusive, but conclusive on the wrong side for his clients.

The question involved was, whether this railroad company, originally incorporated under New York law with a

capital stock of $4,500,000.00, and afterwards consolidated with companies created by Pennsylvania, Ohio and Indiana, had to pay a tax of one-eighth of one per cent. upon the aggregate capital stock of the consolidated company. But the decision of the case, as the Court will not fail to gather from a careful reading of the opinion, turns solely upon the question of the proper construction of a New York statute and of the meaning of these words used therein, "a corporation incorporated by or under any general or special law of this State."

The New York statute provides: "Every corporation, joint stock company or association, incorporated by or under any general or special law of this State having capital stock divided into shares shall pay * * * a tax of one-eighth of one per cent. upon the amount of capital stock which said corporation, joint stock company or association is authorized to have," and the Secretary of State shall not file "any certificate of incorporation or articles of association" until the tax is paid. *But the New York statute does not provide that such tax shall be paid upon the filing of articles of consolidation, nor that it shall be computed upon the aggregate capital stock of consolidated companies.* The only question was, did the terms of the act cover consolidated companies and require them to pay on their whole stock? There was no question as to the power of the State, if it saw fit, to frame an act so as to cover consolidated companies and compel them to pay on their whole stock; in other words, to do just what Ohio has done by the Massie law.

The Court held that by the terms of the act, consolidated companies were not included and required to pay, but that if they were, then (middle page 480), "*If this is required by the true construction of the act of* 1886, *the judgment must be*

affirmed, however unjust or impolitic the exaction may seem to be.

The Court proceeds, bottom page 480: "As a tax on property, it would be clearly invalid, for as said by Judge COOLEY in case of *State Treasurer* vs. *The Auditor General*, 46 Mich. 224, referring to a consolidated railroad from Buffalo to Chicago, which included a Michigan corporation, 'The State can no more tax the whole capital which represents the track from Chicago to Buffalo, the rolling stock and other equipments, than it can tax the whole track and equipments.' *But the tax imposed by the act of* 1886 *being a tax on the privilege of consolidation and not a property tax, the power of the state to subject corporations availing themselves of the act, to any conditions the legislature may see fit to impose, cannot be questioned.*"

Can there be a plainer or stronger declaration of the right to pass a law like the Massie law, and to enforce the contribution required by it? There is no question before this Court as to the construction of the Ohio law. There is no room for construction. The language is so plain as to admit of but one meaning. The act (Section 148*a*) expressly provides (paragraph 3) that the articles of consolidation shall be treated as articles of incorporation, and that the fee shall be determined solely by the amount of capital stock of the consolidation, no credit to be allowed for fees previously paid by constituent corporations. Who can doubt that the New York Court would have made the interstate consolidated railroad company before it pay a fee based on its whole stock had the New York act been worded as the Ohio act is worded?

IV.

There is no denial of the equal protection of the laws. An equal and uniform contribution is required, because there is no tax imposed upon the franchise, which, when incorporated, the company may exercise, but merely a charge for the franchise of becoming incorporated, and this charge is exacted of all seeking such privilege, and in proportion to the privilege granted, as measured by the capital stock.

It was urged below, that the law does not enforce a uniform contribution, because the "franchise tax" is imposed only upon incorporations or consolidations filing articles after its passage, there being, therefore, a discrimination in favor of the corporations or consolidations formed before the passage of the law.

Counsel, by way of illustration, insisted that a tax upon lawyers admitted thereafter to practice, or upon persons in any occupation which excluded those already engaged and applied only to those afterwards engaging, would be void.

The fallacy of the argument lies in the inappropriate use of the word "tax," by opposing counsel. *There is no tax laid, but a charge made or fee fixed.* Will counsel insist that the cost of admission to the bar, by way of a larger fee to be paid to the officers of the Court, cannot constitutionally be increased? I remember just before I was admitted to the bar, the district Courts of Ohio had authority to examine and admit in the home county of the applicant; then the rule was changed, requiring all applicants to go to Columbus, pay a fee to the Clerk of the Supreme Court of Ohio, and pass an examination there. I lived a long way

from Columbus. The lawyers of my town admitted just before I was, had to pay hardly anything for the privilege of practicing this honorable profession. The change in the law imposed a "franchise tax" on me of about twenty-five dollars, a good deal more than one-tenth of one per cent. of my capital at that time. It never occurred to me to impugn the constitutionality of the change because the fellows who got in before I did were not compelled to even up.

The objection loses sight of the fact that there is no imposition laid upon the privilege or franchise, which, when incorporated, the company may exercise. There is a charge for the privilege of becoming incorporated. At that point the contribution ceases. As the charge is for a privilege or franchise, which may or may not be sought from the State, the law of necessity operates upon the future. That the law does not apply to companies already formed does not make it unequal. If it did, then a change in any fee bill, or any rate of charges, or the price for any privileges or franchises to be granted by the State, would be open to the same objection. "The law operates upon the future, and its equality must be determined by the future and not the past."

Persons or corporations can go on as before without making any contribution under this law. In doing so they ask for no additional privileges from the State. But to get further privileges, which the State alone can give, they must pay what the State demands. They can avoid paying the price by not asking for the privilege. There is no imposition, no forced contribution. A voluntary act on their part must precede the paying of the contribution.

A long line of Federal decisions recognizing the right of a State to classify for purposes of taxation, to distinguish between franchises, licenses and privileges and visible and

tangible property, and to use such methods as will, in the opinion of the legislature, result in an equality of burdens. I refer to some of these cases for the purpose of showing the wide discretion a State has in adjusting its system of taxation, notwithstanding the guarantee of the Fourteenth Amendment, which is appealed to in this as in nearly all similar cases:

In *Barbier* vs. *Connelley*, 113 U. S., 31 (a case in which an ordinance of San Francisco prohibiting work in laundries at night was sustained), Mr. Justice FIELD says, respecting the scope of the Fourteenth Amendment, that it was undoubtedly intended by the adoption of that Amendment to provide, "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights. * * * That no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances: that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

As applied to taxation this interpretation has been repeatedly affirmed.

In *Bell's Gap Railroad Company* vs. *Pennsylvania*, 134 U. S., 232, 237, the tax on moneyed securities sustained was assailed on the ground that there was a discriminating classification. The Court held, that as the law applied to all corporate securities, there was no discrimination. Mr. Justice BRADLEY delivered the opinion. On page 237 he

says, that the provision in the Fourteenth Amendment "was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways." Then he mentions the various ways in which property may be classified. He says: "We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation." Such a construction he says, "would render nugatory those discriminations which the best interests of society require." He cites *Barbier* vs. *Connelley*.

In *Home Insurance Company* vs. *New York*, 134 U. S., 594, already cited, it was claimed there was discriminating classification, depriving corporations affected, of the equal protection of the laws. As to this, Mr. Justice FIELD says, bottom page 606:

"The amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There

is no discriminating in favor of one against another of the same class."

The *Pacific Express Company* vs. *Siebert*, 142 U. S., 338, in which a tax on gross receipts of express companies was sustained, Mr. Justice LAMAR says, page 351:

"This Court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or being exempted by them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

In *Railroad Company* vs. *Gibbs*, 142 U. S., 386, it was held that a law which assessed on railroads in South Carolina the expense of a State Railroad Commission, thus classifying railroads for the purpose of imposing on them a specific burden, did not violate the guarantee of the equal protection of laws.

In *Missouri Pacific Railroad Company* vs. *Humes*, 115 U. S., 512, a Missouri law imposing double damages on a railroad corporation for injury resulting from a neglect to fence its road, was sustained, Mr. Justice FIELD saying, bottom page 523:

"The statute makes no discrimination against any railroad company in its requirements. * * * * * There is no evasion of the rule of equalities where all companies are subjected to the same duty and liabilities under similar circumstances."

In *Missouri Railway Company* vs. *Mackey*, 127 U. S., 205,

a Kansas statute making railroad companies liable for injuries to employes resulting from the negligence of their fellow servants, was sustained, Mr. Justice FIELD, in delivering the opinion of the Court, says, page 209:

"The greater part of all legislation is special, either in the objects sought to be obtained by it, or in the extent of its application. * * * * * When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

The following cases sustained laws assailed on the ground that they provided for unjust discrimination through classification:

Horn Silver Mining Company vs. *New York*, 143 U. S., 305. (Heavier tax on foreign than domestic corporations held good.)

Munn vs. *Illinois*, 94 U. S., 113. (Charge on elevators in Chicago to exclusion of other elevators in Illinois, sustained.)

Budd vs. *New York*, 143 U. S., 517. (Law regulating elevator charges in cities having population of over 130,000 sustained.)

Missouri vs. *Lewis*, 101 U. S., 22. (Special judicial provisions for particular localities of a State, sustained.)

Barbier vs. *Connelley*, 113 U. S., 27; *Soon Hing* vs. *Crowley*, 113 U. S., 703. (San Francisco ordinance prohibiting work in public laundries at night, sustained.)

Wurtz vs. *Hoagland*, 114 U. S., 606. (Special New Jersey law regulating assessment for drainage purposes, sustained.)

Walston vs. *Nevin*, 126 U. S., 478. (Kentucky law regulating assessment for street improvements in Louisville, sustained.)

Minneapolis vs. *Beckwith*, 129 U. S., 26. (Iowa act authorizing recovery double the value of stock killed, through neglect to fence, sustained.)

Hayes vs. *Missouri*, 120 U. S., 68. (Special jury law for certain cities in Missouri, sustained.)

Dow vs. *Beidelman*, 125 U. S., 680. (Arkansas law classifying railroads according to length, and regulating passenger charges, sustained.)

V.

The exaction of this fee for a franchise which Ohio alone can grant, in no way interferes with or places a burden on interstate commerce. No tax is imposed, directly or indirectly, upon the franchises outside of Ohio, or the property or the business, of the Wabash System. The charge is for the privilege of consolidation under the Ohio statutes, and for that alone. The only interference is with the privilege to consolidate, and the State may not only interfere with, but abolish that privilege if it choose.

In the Ohio Courts, in support of the contention that, as applied to an interstate railroad consolidation, the exaction of this fee was in violation of the clause of the Constitution of the United States guaranteeing to congress the power to regulate commerce among the several states, it was argued:

First—The filing of the articles of consolidation in Ohio does not create any new corporation under Ohio laws, but the constituent companies still retain the franchises, possess

the property, and exercise the rights and privileges, they did before the consolidation;

Second—Therefore, to exact the fee based on the capital stock of the consolidation, in effect levies a tax upon the franchises, capital stock and property of corporations created and existing outside of Ohio; and,

Third—Since these foreign corporations, along with the Ohio constituent corporation, are engaged in interstate commerce, the exaction of a fee amounts to a regulation of and burden upon commerce among the States.

The Supreme Court of Ohio has decided, upon ample and conclusive authority, that the consolidation of an Ohio railway corporation with railway corporations of other States does create a new corporation under Ohio law, thus virtually destroying the fundamental proposition of the entire contention. The only question that remains is, whether the fact that the railway companies desiring to consolidate in Ohio are engaged in interstate commerce, is sufficient to exempt them from paying the same fee for the privilege of consolidation which all other corporations are required to pay in Ohio. In other words, does the Constitution of the United States oblige the State of Ohio to permit railway companies to consolidate without complying with the terms and conditions fixed by Ohio, simply because these companies are engaged in interstate commerce? All other corporations desiring to consolidate must pay a fee measured by the capital stock of the consolidated company. Must railway comnies be exempted from paying this fee because they are engaged in interstate commerce?

Undoubtedly, the power to regulate commerce among the States belongs to Congress, and the States cannot interfere with or regulate it in any way. But, as said by the Su-

preme Court of Ohio (*Record*, bottom page 33), "The duties of the States in respect to such commerce is passive and not active. No State is under any Federal obligations to furnish highways or to create agencies of any kind for the purpose of facilitating interstate commerce. The grant of the right to be a corporation is within the sovereign discretion of the State, and cannot be controlled by any other power, State or Federal. As it may create or withhold such franchises at its pleasure, it may grant them upon such conditions as best suit its own notions of convenience and policy. Hence, the State violates no Federal duty toward non-residents, whether corporate or natural persons, in refusing them corporate franchises or in making an exaction for the grant of the same, simply because such persons may have the control of a system of railways used in interstate commerce. 'The right or privilege,' says Mr. Justice FIELD, 'to be a corporation or to do business as such body, is one generally deemed of value to the corporation or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely within the discretion of the State, and of course when granted may be accompanied by such conditions as the legislature may judge most befitting to its interest and policy. It may require as a condition of the grant of the franchise and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe."

In *Laloup* vs. *Mobile*, 127 U. S., 640, 648, and *Lyng* vs. *Michigan*, 135 U. S., 161, 166, this Court, speaking in the first case by Mr. Justice BRADLEY, and in the second by Mr. Chief Justice FULLER, stated the rule in these words: "No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

The fee, or if you please to term it, tax, under consideration, does not come within these inhibitions; it is not a tax on "the subjects of that commerce," that is, the freight or passengers of this railroad company; it is not a tax "on the receipts" of this railroad company; it is not a tax "on the occupation or business" of interstate railway traffic carried on by the Wabash System. If a tax, it is a tax on the franchise or privilege of becoming a consolidated corporation under the laws of Ohio.

The State does not, by the Massie law, impose any tax or burden, directly or indirectly, upon the interstate business of the Wabash System. There is no attempt, by this act, to levy any tax upon the subjects of the transportation of the company, upon its receipts, upon its property, or upon anything beyond the jurisdiction of the State, growing out of its interstate commerce transactions. The Wabash System was free, after the passage of the Massie law, to carry on its interstate business without exaction or interference, the same as before. It was not obliged to become a consolidated company under the laws of Ohio; nor was the transaction of its business made to depend upon its filing such articles and

becoming such consolidated corporation. It could have continued its business with the same freedom in Ohio, whether it consolidated or not under its laws. But, for its own reasons, it preferred to consolidate. "That the franchise of being a corporation under the laws of this State, would be fruitful of advantage to those who own and operate the Wabash System may well be inferred from the fact that they are anxious to obtain it. And the State is in no way averse to making the grant; it simply requires that its terms be complied with." (Ohio Supreme Court, *Record*, page 34.) The only interference by this law was with the privilege to consolidate, and the State may not only interfere with, but may withhold or abolish that privilege if it choose. The granting of the privilege to consolidate is a sovereign prerogative of the State, over which it has, and in the nature of things must have, absolute control. None of the many cases cited in the interesting brief of counsel below, in any way held that the State may not do what Ohio has done in this instance.

In the brief filed below, four cases, decided by this Court, were especially referred to, namely, *Norfolk and Western Railway Company* vs. *Pennsylvania*, 136 U. S., 114, *Crutcher* vs. *Kentucky*, 141 U. S., 47, *Railroad Company* vs. *Jackson*, 7 Wallace, 262 and *State Tax on Foreign Held Bonds*, 15 Wallace, 300.

The case of the *Norfolk and Western Railway Company* vs. *Pennsylvania*, turns upon the fact (see bottom page 120), that the foreign railway company, existing under the laws of Virginia and West Virginia, "did not exercise, or seek to exercise, in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof." Therefore, the Court held that the

tax being a tax simply for having an office in Philadelphia in connection with its railroad business, was a tax upon one of the instrumentalities of the interstate commerce carried on by the company. But in the case at bar, there is no tax on the Wabash Company for having an office in Ohio, there is no tax on any one of the means or instrumentalities of the Wabash Company's business. There is a charge for a special franchise granted by the State at the company's request.

It may be conceded, as decided in *Laloup* vs. *Mobile*, 127 U. S., 640, *Crutcher* vs. *Kentucky*, 141 U. S., 47, and other similar cases, that a State cannot require that a license be taken out for carrying on interstate commerce; but an enactment relating only to the terms upon which corporate capacity in various shapes may be conferred by Ohio laws, a measure regulating and controlling the granting of corporate privileges by this State, has no proper connection with the business to be carried on by the companies when incorporated. The law says, you shall pay so much for the privilege of becoming incorporated or consolidated. It does not say, you shall pay so much for carrying on any business when incorporated or consolidated. The law does not look beyond the act of incorporation or consolidation. The charge is for what is done in the State, and by the State itself, for the grant of the privilege or franchise.

In *Railroad Company* vs. *Jackson*, 7 Wallace, 262, a Pennsylvania law levied a tax on the bonds of a consolidated railroad, incorporated by the States of Maryland and Pennsylvania, and operating a line through Maryland and Pennsylvania, and required the railroad company to retain the tax out of the interest or coupons on the bonds. It was held, Mr. Justice NELSON delivering the opinion, that the tax was invalid because it operated on property and interests beyond

the jurisdiction of Pennsylvania. "Now, it is apparent, if the State of Pennsylvania is at liberty to tax these bonds, that to the extent of its Maryland portion of the road, she is taxing property and interests beyond her jurisdiction." (Page 267.)

In the subsequent case of *State Tax on Foreign Held Bonds*, 15 Wallace, 300, a tax on bonds issued by the Cleveland, Painesville and Ashtabula Railroad Company, and secured by a mortgage on its line in Pennsylvania and Ohio, which bonds were held by non-residents of Pennsylvania, was held to be invalid, notwithstanding the tax was apportioned by the mileage basis so as to operate only on the bonds secured by the part of the line in Pennsylvania. The Court approved of the decision in *Railroad Company* vs. *Jackson*, but not of the reasoning upon which the decision was based. It was not the fact that a part of the road covered by the mortgage securing the bonds in the Jackson case was outside Pennsylvania, but the fact the bonds were held by a non-resident, which rendered the attempted tax invalid. Said Mr. Justice FIELD, speaking for the Court, page 319: "It was the fact that the bonds were held by a non-resident which justified the language used, that, to permit a deduction of the tax from the interest, would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned Justice."

It is said further, page 320: "But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. All the property there can be in the

nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due."

These two cases were cited below as if the decisions in them turned upon the fact that the bonds were secured in part by railroad property not situated within the State which attempted to tax the bonds, and, therefore, were in point in the case at bar. In point of fact, the decision turned upon the non-residence of the holders of the bonds. The bonds followed the holder and were taxable at the domicile of the holder. The fact that the railroads which secured the bonds ran through more than one State had nothing to do with the decision. If the bonds had been held in Pennsylvania, they would have been taxable there, although based in part on railroad property outside of Pennsylvania. So with the franchise in this case. It is an Ohio franchise, conferred by Ohio, and for which Ohio may charge what price it sees fit. The location of the property owned, or which may be owned, by the company operating under this franchise, can no more affect the charge made by Ohio for granting it, than could the location of the railroad property securing these bonds prevent their taxation in the hands of a holder within the jurisdiction of the taxing State.

In this case of the State tax on foreign-held bonds, Mr. Justice FIELD, answering the claim that Pennsylvania might tax the bonds, because it created the corporation, says, page 322:

"The legality of a tax of that kind would not be questioned if *in the charter of the company the imposition of the tax were authorized*, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were

stated. The tax in that case would be in the nature of a license tax for negotiating the loan."

To apply this to the case at bar, the legality of the fee for the privilege of incorporation cannot be questioned, for such fee is virtually a part of the charter of the company, a condition annexed by law to the grant of the charter, and required to be paid before the consolidation can be effected.

Driven from every other ground, counsel may insist, as he did below, that this "privilege tax, rated upon the whole capital stock," to use his phrase, was in effect "a direct assessment upon all the property or income" of the consolidated company, wherever situated, because, "the money used to discharge such a tax must necessarily be taken proportionately from the income of property and result of business done outside the State."

There is no argument in this. As was very justly observed by this Court in the case of the *State Tax on Railway Gross Receipts*, 15 Wallace, 293, "Every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."

Again, using the language of Mr. Justice FIELD in *the Delaware Railroad Tax Case*, 18 Wallace, 232: "The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use and possession of the thing taxed."

Probably the completest answer to this claim may be made in the language of Mr. Justice BRADLEY, in the *Baltimore and Ohio Railroad Company* vs. *Maryland*, 21 Wallace,

473, already cited: "It [the bonus or price for the franchise in question] may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation, affects more or less the charges it is compelled to make upon its customers. So, the State has an undoubted power to exact a bonus for the grant of the franchise, payable in advance or *in futuro*; and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose."

To say that every tax is a burden upon interstate commerce, which must be paid out of the income or earnings of a corporation engaged in interstate commerce business, is to say that such a corporation must be held exempt from State taxation. Every tax paid by a corporation is a burden upon that corporation; it must be paid out of its receipts, and cuts down its net earnings. The tax is intended to be a burden on the corporation; it is intended to make the corporation bear a share of the burdens of the State. The real question is, not whether the tax is a burden on the corporation, but whether the property, or business, or franchise of the corporation is so owned, or conducted, or enjoyed within the State as to be subject to taxation. Over and over again this Court has held that a corporation engaged in interstate commerce business, may be compelled to contribute to the revenues of the State in which it holds property, enjoys franchises, or does business. I mention some of the many cases.

State Tax on Gross Receipts, 15 Wallace, 284, 294, 295, 296. (Tax on gross receipts of Pennsylvania railway corporation, sustained.)

State Railroad Tax Cases, 92 U. S., 608. (Tax on property of railroad company ascertained on mileage basis, sustained.)

Telegraph Company vs. *Texas*, 105 U. S., 460. (Tax on messages wholly within the State of Texas, sustained.)

Brown vs. *Hueston*, 114 U. S., 623. (Tax on coal transported from Pittsburg to New Orleans, and held in barges on listing day, sustained.)

Western Union Telegraph Company vs. *Massachusetts*, 125 U. S., 530. (Tax on property measured by capital stock in Massachusetts, sustained.)

Ratterman vs. *Western Union Telegraph Company*, 127 U. S. 411. (Tax on receipts from business done in Ohio, sustained.)

Pullman Car Company vs. *Massachusetts*, 141 U. S., 18. (Tax on capital stock or property of company within Pennsylvania, ascertained by mileage basis, sustained.)

Maine vs. *Grand Trunk Railway Company*, 142 U. S., 217. (Franchise tax on foreign corporation, measured by gross receipts ascertained upon the mileage basis, sustained.)

Pacific Express Company vs. *Siebert*, 142 U. S., 354. (Tax on the receipts within the State, sustained.)

VI.

The fee was paid voluntarily and cannot be recovered back. If the plaintiffs had any statutory or other right to file these articles and form a consolidated company under the laws of Ohio, without paying the fee fixed by the statute and required by the Secretary of State, they could and should have enforsed this right by proceedings in mandamus to compel the Secretary of State to file the articles upon the payment of the fee which they tendered and conceded to be due.

The reasons why the fee was paid voluntarily and not under compulsion have already repeatedly been presented in discussing the other propositions involved. For any further discussion, I refer the Court to the decision of the Circuit Court of Franklin County, Ohio, printed as an appendix.

CONCLUSION.

To SUM UP:

1. The charge made for the privilege of consolidation may be justified as a proper exercise of the legislative authority under the Constitution, to prescribe the terms and conditions on which corporations may be created, and when created may do business in Ohio; in other words, the power to regulate corporations, say when they may be formed, and how they may act when formed. The granting of corporate franchises resting entirely within the discretion of the State, a contribution to its revenues may be exacted as a condition of the grant.

2. The raising of revenue being a recognized purpose of government, the General Assembly, under the general grant of legislative power, may exact this contribution, which is not imposed on property, but charged for franchises, and is equal and uniform, exacted from all obtaining corporate privileges, and in proportion to the extent of the privileges obtained, as measured by the capital stock, the distinguishing feature of corporate existence.

3. The effect of filing articles of consolidation of a railway company of Ohio with railway companies of other States, is to create a new corporation, and to confer upon the new consolidated company additional and valuable privileges in Ohio. For the franchises thus granted and privileges conferred, the charge under the Massie law is made.

4. There is no denial of the equal protection of the laws, within the inhibition of the Fourteenth Amendment to the Federal Constitution. An equal and uniform contribution is required, because there is no tax imposed upon the franchise, which, when incorporated, a company may exercise, but merely a charge for the franchise of becoming incorporated, and this charge is exacted of all seeking such privilege, and in proportion to the privilege granted, as measured by the capital stock.

5. The exaction of this fee for a franchise which Ohio alone can grant, in no way interferes with or places a burden on interstate commerce. No tax is imposed, directly or indirectly, upon the franchises outside of Ohio, or the property or the business, of the Wabash System. The charge is for the privilege of consolidation under Ohio statutes and for that alone. The only interference is with the privilege to consolidate, and the State may not only interfere with, but abolish that privilege if it choose.

6. The fee was paid voluntarily and cannot be recovered back, for reasons recently stated.

RESULTS OF THE LAW.

The incorporation fee bill attacked in this case has been in operation since 1889. The following table shows the results of the law for the five years succeeding its passage as compared with the results of the three years before its passage:

YEAR.	NO. OF COR.	AMT. CAP. STK.	FEES.
	PRIOR TO ENACTMENT OF MASSIE LAW.		
1886,	882	$106,116,950 00	$22,152 89
1887,	1251	160,712,475 00	33,720 80
1888,	1071	95,960,750 00	23,258 80
		Total, . . .	$79,132 49
	SINCE THE ENACTMENT OF THE MASSIE LAW.		
1889,	1193	257,541,505 00	$146,379 13
1890,	1210	283,865,000 00	193,200 72
1891,	1289	193,100,805 00	105,403 47
		Total, . . .	$444,983 32
1892,	1307	$240,267,100 00	$120,076 50
1893,	1216	267,481,500 00	170,301 00
		Total, . . .	$735,360 82

Of the above fees, the following were paid by interstate railway consolidations:

Kanawha and Michigan Railway Co., . .	$10,000 00
The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co., ...	75,000 00

Wabash Railroad Co., ...	52,000 00
Cincinnati, Jackson and Mackinaw Railroad Co.	16,300 00
The Pittsburgh, Shenango and Lake Erie Railway Co., ...	7,800 00
The Baltimore and Ohio Southwestern Railway Co., ...	30,000 00
	$191,100 00

A study of this table is instructive. Compare the number of incorporations before with those since the passage of the act. Compare the collections before with the collections since. If the fees are excessive and burdensome, why has not the increase of corporations been checked? In fact, more corporations have been created, upon the voluntary request of those advised of the price to be paid for the privilege asked, and thus no inconsiderable revenue has flowed into the treasury for the use of the State, lifting to that extent the burden on land and tangible property, a burden which falls usually on those least able to bear it.

Believing that this law is not only a valid enactment, but a wise and politic measure, which has added to the revenues of the State of Ohio, without increasing the burdens of the people, I leave it with the Court.

Respectfully submitted,

J. K. RICHARDS,
Attorney-General of Ohio.

February 21, 1894.

APPENDIX.

(Second Circuit—Franklin County, Ohio, Circuit Court—January Term, 1892.)

Before STEWART and SHAUCK, JJ.

OSSIAN D. ASHLEY ET AL. *vs.* DANIEL J. RYAN, *Secretary of State*, and other cases.

When money is paid to the Secretary of State by natural persons upon the filing of certificates of incorporation, or by railroad corporations upon the filing of agreements of consolidation, such payment is voluntary, though made under protest.

ON APPEAL FROM THE COURT OF COMMON PLEAS.

SHAUCK, J.: The plaintiffs in these several cases presented to the defendant in his official capacity, as Secretary of State, in two cases agreements of consolidation between a domestic and foreign railroad corporations; in another a similar agreement as to domestic corporations, and in the other a certificate of incorporation, and demanded that he file the same in his office. In accordance with the provisions of the act of February 12, 1889, he demanded the sums prescribed by that act as fees for such official services, whereupon the plaintiffs asserting that the act is invalid, paid the sums demanded under protest, and they now seek to enjoin the defendant from paying said money into the treasury of the State as the statute directs. The cases are submitted on demurrers to the petitions.

In some of these cases, we are compelled to assume that the plaintiffs intend to bring suit against the Secretary of State to recover back the sum, so that we may regard the relief here sought as an incident to that, to the end that the money may remain in the hands of the officer until they can recover judgments therefor.

In the arguments, the constitutional validity of the act referred to has been assailed; but we are not persuaded, that the consideration of any question of such gravity is necessary to the right determination of the cases. After all possible presumptions in aid of the plaintiffs, the injunctions sought are mere incidents to the supposed right to recover back the money paid. They cannot be granted unless that right exists. The petitions allege that the moneys were demanded by the defendant as a condition of his acceptance of the agreements and certificate for filing, and that they were then paid under protest. But it is familiar law, that cases in which money has been voluntarily paid do not call upon courts to determine whether it was rightfully demanded, because it can in no event be recovered back. Nor does a protest render a payment involuntary unless made under circumstances of immediate and urgent necessity, that it be paid to preserve an existing right, such as the possession of goods, the liberty of the person or the pursuit of an occupation. It is said that the case of *Baker* vs. *The City of Cincinnati*, 11 Ohio St., 534, is authority for the conclusion, that the payments in the cases before us were involuntary, for the reason that the parties were not on an equal footing. Whether the doctrine of that case is consistent with that of the recent case of *Whitbeck* vs. *Minch*, 25 W. L. B., 136, we need not consider, since the cases before us are broadly distinguishable from *Baker* vs. *Cincinnati*. The money there demanded by the

public officer, was a condition to the delivery of a license without which the plaintiff could not carry on a business which was his natural right, and which was forbidden only by the ordinance which provided for the exaction. In the cases before us the payment was demanded by the defendant in pursuance to the terms of the statute and as a condition to the filing of agreements and certificates which were not necessary to the continued exercise of any right which the plaintiffs theretofore had. Without it, the plaintiff corporations could continue in the exercise of all the franchises theretofore acquired, and the other plaintiffs could continue in the unrestricted exercise of all their natural rights.

Counsel for the plaintiff are doubtless correct in the assertion, that although in form the moneys demanded by the defendant were fees for services, they were in fact impositions in behalf of the State. This is not only an inference from the fact that the large sums demanded are disproportionate to the service rendered, but other provisions of the statute require the Secretary to pay the money to the Treasurer of State. These suits, therefore, seek to place the Secretary of State in the position of an involuntary trustee, and to charge him with the responsibility for the safe keeping of large sums of money in which he has no personal interest, and for whose safe custody in his office no appropriate means are provided. Considerations of policy and justice forbid that a public officer strictly pursuing the line of duty prescribed by the Legislature, should be unnecessarily and thus seriously harrassed. These extraordinary proceedings are wholly unnecessary. If, as the plaintiffs claim, the Legislature was without power to prescribe these exactions as conditions to the right of natural persons to become bodies corporate, and of existing corporations to consolidate, it was

